TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1901.

No. 237

LOUIS BEYER, APPELLANT,

vs.

CAROLINE LE FEVRE.

APPEAL FROM THE COURT OF APPEALS OF THE DISTRICT OF COLUMBIA.

FILED JANUARY 22, 1901.

(18,031.)

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In the Court of Appeals of the District of Columbia.

LOUIS BEYER ET AL., Appellants, vs. CAROLINE LE FEVRE. } No. 1009.

a Supreme Court of the District of Columbia.

CAROLINE LE FEVRE vs. LOUIS BEYER, LOUIS BEYER, JUNIOR; HELEN B. JOHNSON, Louis Beyer, Jr., Executor; Myer Cohen and Adolph G. Wolf, Trustees. } No. 20324. In Equity.

UNITED STATES OF AMERICA, *District of Columbia,* } ss:

Be it remembered that in the supreme court of the District of Columbia, at the city of Washington, in said District, at the times hereinafter mentioned, the following papers were filed and proceedings had in the above-entitled cause, to wit:

1 *Bill of Complaint.*

Filed Apr. 7, 1899.

In the Supreme Court of the District of Columbia, the 7th Day of April, A. D. 1899.

CAROLINE LE FEVRE, Plaintiff, vs. LOUIS BEYER, LOUIS BEYER, JUNIOR; HELEN B. JOHNSON; Louis Beyer, Jr., Executor; Meyer Cohen and Adolph G. Wolf, Trustees. } Equity. No. 20324.

To the supreme court of the District of Columbia, holding an equity court:

The plaintiff states as follows:

1st. That she is a citizen of the United States and a resident of the District of Columbia.

2nd. That all the defendants are citizens of the United States and residents of the District of Columbia, and are sued in their individual capacity, except the defendants Myer Cohen and Adolph G. Wolf, who are sued in this action as trustees under a deed of trust hereinafter more fully set forth and recited.

3rd. That heretofore, to wit, on the eleventh day of May, A. D. 1896, one Mary Beyer, late of the District aforesaid, deceased,
2 executed and delivered a certain deed of trust to Charles C. Glover and Myron M. Parker as trustees, conveying to them in fee-simple the property therein described, situated in the District of Columbia, to secure the payment of the sum of $2,800.00, as therein set forth (a certified copy of which is herewith filed, marked Plaintiff's Exhibit C. L., "A," and prayed to be read, taken, and considered as part hereof).

4th. That the sum of money intended to be secured by the execution and delivery of said deed of trust has never been repaid nor has the legal title to the real estate thereby conveyed ever been released, retransferred, or reconveyed by the trustees therein named to the said Mary Beyer, but is still outstanding in them.

5th. That during her lifetime the said Mary Beyer intermarried with Louis Beyer, one of the defendants, but no children were born to the said Mary and Louis.

6th. That the said Mary Beyer departed this life on or about the 26th day of July, 1896, leaving as her only heirs-at-law, distributees, and next of kin two sisters, to wit, Elizabeth K. Maus and this plaintiff, and one nephew, to wit, the defendant Louis Beyer, Jr., who is the son of a deceased sister of said Mary Beyer, who died prior to the death of said Mary.

7th. That at the time of her decease the said Mary Beyer was in the 65th year of her age and had been in feeble health for a number of years prior thereto, and the treatment which was necessary in her bodily ailment and the drugs administered to her for the relief thereof so impaired her mental faculties as to render her incapable of understanding the most ordinary affairs of life or of knowing or
3 appreciating the nature, character, value, or extent of her estate, her right to exercise dominion over the same, the relatives whom she had or the natural objects of her bounty, and wholly incapable of executing a valid deed or contract, and that this condition of mind and body existed for some time prior to her decease and was her condition down to the day of her death and upon the date and at the time of the alleged execution of said paper-writing.

8. That on or about the 14th day of July, A. D. 1896, while the said Mary Beyer was so feeble and suffering, the defendants Louis Beyer, Jr., and Helen B. Johnson had a paper-writing purporting to be a last will and testament, prepared under their direction and in accordance with their instructions by a lawyer of their own selection, whom this plaintiff is informed and believes, and therefore alleges, the said Mary Beyer had never seen, and induced the said Mary Beyer to affix her name to the same while she was upon her bed of death and so feeble, both mentally and physically, that she was unable to resist their importunities and was not a free agent or able to form or express her wishes as to the disposition of her estate.

9th. That by the terms and provisions of said paper-writing purporting to be her last will and testament of said Mary Beyer (a certified copy whereof is filed herewith as part hereof, marked Plaintiff's

Exhibit C. L., "B"), after a slight request as to her husband's treatment, the entire estate and property of the said Mary Beyer of every description is devised and bequeathed to the defendants Louis Beyer, Jr., and Helen B. Johnson, and the said Louis Beyer, Jr., is constituted and appointed the sole executor thereof without bond.

10th. That the terms and provisions of said pretended last
4 will and testament were concealed from the defendant Louis Beyer, the husband, by the said Louis Beyer, Jr., and Helen B. Johnson until after the death of said Mary Beyer, because they were afraid that he would protest against the consummation of their unlawful schemes and thwart and prevent them, and they procured the signature to said paper-writing during his absence, which absence they had cunningly contrived to bring about.

11th. That said Mary Beyer's death occurred less than two weeks after the pretended execution of said paper-writing, to wit, on July the 26th, A. D. 1896.

12. That said Mary Beyer's personal property and effects, so far as this plaintiff has been able to ascertain, amounted to but little; but this plaintiff is informed that the equity of redemption which the said Mary owned at the time in the property, more fully set forth in Plaintiff's Exhibit C. L., "A," already referred to in paragraph 3 of this bill, is very valuable, being estimated, as this plaintiff is informed, at upwards of twenty-five thousand ($25,000) dollars.

13th. That about one month after the decease of the said Mary Beyer, to wit, on or about the 29th day of August, 1896, the said Louis Beyer, Jr., propounded the said paper-writing in the supreme court of the District of Columbia, holding a special term for orphans' court business, as and for the last will and testament of said Mary Beyer, and the same was shortly thereafter admitted to probate in common form and without contest, and letters testamentary thereon were granted to said defendant, Louis Beyer, Jr., who qualified as such executor by giving bond in the penalty of three hundred ($300.00) dollars.

14th. That soon after the death of said Mary Beyer and the pro-
pounding of said paper-writing for probate the defendant
5 Louis Beyer filed in said supreme court of the District, holding a special term for orphans' court business, his caveat to said paper-writing and to the admission thereof to probate and the grant of letters testamentary thereupon; but in consideration of the conveyance by said Louis Beyer, Jr., and said Helen B. Johnson, the devisees under said alleged last will and testament of all their interest in and to a portion of said real estate (which this plaintiff is informed and believes amounts in value to one-half thereof), the said defendant, Louis Beyer, caused his said caveat to be withdrawn.

15th. This plaintiff further alleges that subsequent to the events set forth in the two next preceding paragraphs of this bill of complaint her sister, Elizabeth K. Maus, in consideration of a large money payment by said Louis Beyer, Jr., and Helen B. Johnson, to her (the exact amount of which is to this plaintiff unknown), executed

and delivered to said Louis Beyer, Jr., and Helen B. Johnson a release, discharge, and quitclaim of and to all her estate and interest in and to the estate of the said Mary Beyer, deceased.

16th. That subsequent to the execution of the deed by said Louis Beyer, Jr., and Helen B. Johnson, purporting to convey certain of said real estate of which *of which* said Mary Beyer died seized to said Louis Beyer, the said Louis Beyer, on May 12th, 1897, conveyed to the defendants Myer Cohen and Adolph G. Wolf, in trust to secure the payment of $2,000.00 to one Carl Schoenhop, all the property which the said Louis Beyer, Jr., and Helen B. Johnson pretended to convey to him, the said Louis Beyer, and which is a portion of the said real estate and equity of redemption of which the said Mary Beyer died seized or possessed; which deed of trust has
6 been recorded among the land records of the District in Liber 2206, folio 474, as will appear from a certified copy thereof, herewith filed, marked Plaintiff's Exhibit C. L., "C," and prayed to be taken as part hereof.

Prayers.

In consideration of the premises, the plaintiff prays:

1st. That the paper-writing bearing date the 14th day of July, 1896, and purporting to be the last will and testament of Mary Beyer, be decreed to be not her last will and testament.

2nd. That the deed of trust from Louis Beyer to the defendants Myer Cohen and Adolph G. Wolf, trustees, be decreed to be void, invalid, and inoperative.

3rd. That the defendants Myer Cohen and Adolph G. Wolf, trustees under said deed, and each and every of them, be restrained and forever enjoined from enforcing or attempting to enforce the terms, provisions, or conditions of said deed of trust.

4th. That a receiver may be appointed by this honorable court to take charge of all the real estate of which the said Mary Beyer died seized, and to collect the rents, issues, and profits thereof during the pendency of this suit.

5th. That the defendants Louis Beyer, Louis Beyer, Jr., and Helen B. Johnson be decreed to render an account of all the rents, issues, and profits of said estate collected by them or either of them since the decease of the said Mary Beyer, and to pay over the amount of said collections to the receiver to abide the results of this action.

7 6th. That this plaintiff may have such other and further relief as her case may require and this honorable court may be competent to decree.

7th. That the writ of subpœna may issue out of and under the seal of this honorable court, directed to the said Louis Beyer, Louis Beyer, Jr., Helen B. Johnson, Louis Beyer, Jr., executor of the last will and testament of Mary Beyer, deceased, and Myer Cohen and Adolph G. Wolf, trustees, commanding them to appear and answer the exigencies of this petition or bill of complaint, answers under

oath being hereby waived, and to abide by and perform such order or decree as may be passed in said cause.

CAROLINE LEFEVRE.

CHAS. POE,
CLAYTON E. EMIG,
Solicitors for the Plaintiff.

DISTRICT OF COLUMBIA:

I do solemnly swear that I have read the petition by me subscribed and know the contents thereof, and that the facts therein stated upon my personal knowledge are true, and those stated upon information and belief I believe to be true.

CAROLINE LEFEVRE.

Subscribed to before me this 5th day of April, 1899.

EBENEZER SOUTHALL,
[SEAL.] *Notary Public.*

8 EXHIBIT C. L., "A," TO BILL.

Filed Apr. 7, 1899.

Mary Beyer *et vir* to Glover and Parker, Trs. } Recorded May 11, 1896, 11.26 a. m. Trust.

Liber No. 2107, folio 367 *et seq.*; fee, $2.25; st., 10 cts.

This deed, made this 11th day of May, A. D. 1896, witnesseth, that Mary Beyer and Louis Beyer, her husband of the District of Columbia (said Mary Beyer acting and contracting herein in relation to her separate estate), parties hereto of the first part for the purpose of carrying into full effect the uses and trusts hereinafter declared and for and in consideration of five dollars to them in hand paid by Charles C. Glover and Myron M. Parker of the said District parties hereto of the second part receipt of which, in current money of the United States at the date of delivery hereof, is hereby acknowledged, have bargained and sold, granted, enfeoffed and conveyed and do hereby bargain and sell, grant, enfeoff and convey unto and to the use of the said Charles C. Glover and Myron M. Parker, as joint tenants their heirs and assigns, the following-described land and premises, with the improvements, easements, rights, ways and appurtenances thereunto belonging situate and lying in the county of Washington in the District of Columbia, namely: All of lots numbered seventy-one (71) and seventy-two (72) in Haw's subdivision of part of the tract of land known as Mount Pleasant, as per plat recorded respectively in Liber J. A. S. No. 229 folio 341, of the land records of the District of Columbia, and in Liber C. J. U. folio 48, of the records of the office of the surveyor of the said District.

9 To have and to hold, the said described land with the improvements, rights, ways, easements and appurtenances unto

and to the use of the said Charles C. Glover and Myron M. Parker, as joint tenants, their heirs and assigns, in and upon the uses and trusts following and to and for no other use, intent or purpose that is to say, first, to secure the full and punctual payment of two certain joint and several promissory notes of even date with these presents, in the sum of fourteen hundred dollars ($1,400) each made and *signed by the said parties of the first part and given for money* loaned said Mary Beyer for the benefit of and in relation to her separate estate and payable to the order of Arthur T. Brice three years after date; and interest thereon from date and until paid, at the rate of five per centum per annum, payable semi-annually; each instalment of interest to bear interest after maturity if not then paid at the rate aforesaid. Principal and interest payable at the banking-house of Riggs and Company, Washington, D. C. And also to secure the reimbursement of the holder or holders of said notes and the trustees herein named on the survivor, for any and all costs and expenses including reasonable counsel fees incurred or paid on account of any litigation at law or in equity which may arise in respect of this trust or the indebtedness or property herein mentioned, while this trust continues. Second, until any sale and conveyance as hereinafter provided for to permit the said Mary Beyer her heirs and assigns, to possess and enjoy said described premises and to receive the issues and profits thereof and on full payment of said notes and interest thereon, and all sums advanced or expended in respect of this trust (including half commissions, to the trustees on the debt secured in case of advertisement hereunder and no sale), to release and reconvey in fee at the expense of the releasee unto the said Mary Beyer or the person or persons then claiming under her, the aforesaid land and premises. Third, upon any default being made in payment of either of said notes when due or any extensions or renewals thereof, or any instalment of interest thereon; or in payment of any taxes now or becoming due on said land and premises while this trust exists, after demand made for payment of such taxes, or in keeping while this trust exists, a fire insurance on the buildings on said land in an amount not less than $2,500 and to the satisfaction of the party hereby secured and the policy or policies duly assigned for the benefit of this trust or in payment on demand of any sum or sums advanced by the holder or holders of said notes on account of any costs and expenses of this trust or on account of any such taxes or insurance or expense of litigation with interest thereon at 6 per centum per annum from date of advance (it being hereby agreed that on any default in payment of said costs, expenses or taxes insurance or expense of litigation as aforesaid the same may be paid by the holder or holders of said notes and all sums advanced in so doing with interest as aforesaid shall forthwith attach as a lien hereunder and be demandable at any time) then and in either event the said parties hereto of the second part, or the survivor of them or his heirs or substituted trustees shall sell at public auction, the hereinabove granted and described real estate and improvements, at such time and place upon such terms and condi-

tions, with such postponement of sale or resale and after such previous public notice not less than ten days as to the said parties hereto of the second part or the survivor or his heirs or sub-
11 stituted trustee shall seem best for the interest of all parties concerned; (and the terms of sale being complied with), shall convey in fee to, and at the cost of the purchaser, the premises so sold, such purchaser being hereby discharged from all liability for the application of the purchase-money; and shall apply the proceeds of sale (after paying all expenses of sale, all taxes thereon due all sums advanced for costs or taxes, or insurance or expense of litigation as aforesaid, with interest as aforesaid, and a trustee's commission of five per centum on the gross amount of sales), to the payment of the aforesaid indebtedness, or so much thereof as may remain unpaid, whether then due or not, with interest unpaid thereon at the rate aforesaid to the date of payment, paying over the surplus, if any, to the said Mary Beyer her heirs or assigns. And the said parties of the first part for themselves and their heirs, do hereby covenant with said parties of the second part, or the survivor his heirs and assigns or substituted trustee to forever warrant and defend *and* the title, to said granted premises unto the said parties hereto of the second part, the survivor, his heirs and assigns or substituted trustee, for the uses and purposes hereinbefore declared, from and against all persons claiming the same or any part thereof by through or under the said parties hereto of the first part; and at the cost of the person requesting the same to execute and deliver any other or further deed or deeds deemed by legal counsel necessary to more fully assure the title to said granted premises unto the said parties hereto of the second part, the survivor, his heirs and assigns, for the uses aforesaid. In testimony whereof, the said parties of the
12 first part have hereunto set their hands and seals the day and year first hereinabove written.

MARY BEYER. [SEAL.]
LOUIS BEYER. [SEAL.]

Signed, sealed, and delivered in presence of—
LOUIS BEYER, JR.

DISTRICT OF COLUMBIA, *To wit:*

I, Louis Beyer, Jr., a notary public in and for the District aforesaid, hereby certify that Mary Beyer and Louis Beyer, her husband, the grantors in and who are personally well known to me as the persons who executed the aforegoing and annexed deed, dated May 11th, A. D. 1896, personally appeared before me in the said District and acknowledged the said deed to be their act and deed; and the said Mary Beyer being by me examined privily and apart from her husband, and having the deed aforesaid fully explained to her by me, acknowledged the same to be her act and deed and declared that she had willingly signed, sealed, and delivered the same, and that she wished not to retract it.

Given under my hand and notarial seal this 11th day of May, A. D. 1896.

LOUIS BEYER, JR.,
Notary Public.

[NOTARIAL SEAL.]

DISTRICT OF COLUMBIA:

OFFICE OF THE RECORDER OF DEEDS, *April* 3, 1899.

This is to certify that the foregoing is a true and verified copy of an instrument as recorded in Liber No. 2107, fol. 367 *et seq.*, one of the land records of the District of Columbia.

GEO. F. SCHAYER,
Dep. Recorder of Deeds.

[SEAL.]

(Stamp.)

13 EXHIBIT C. L., "B," TO BILL.

Filed Apr. 7, 1899.

In the name of God, Amen.

I Mary Beyer of the city and county of Washington and District of Columbia being now of sound and disposing mind, do make, ordain, publish and declare this to be my last will and testament: That is to say, first after all my lawful debts are paid and discharged the residue of my estate, real and personal I give, devise, bequeath, and dispose of as follows: to wit, all the furniture and personal effects now in the home, number 2258 Brightwood avenue I desire to remain there during the life of my husband Louis Beyer or so long as it remains the family home and in the event of the house not being retained as a family home then the furniture and all other personal effects belonging to me are to go to and belong to my nephew and adopted son born Charles Lewis Smith but adopted by me at birth and thereafter always called Louis Beyer Junior.

To my sister Elizabeth Kersinski Maus of Philadelphia Pa. I leave five dollars.

To my sister Caroline Kersinski Lefevre of Brookland D. C. I leave five dollars.

To my niece Helen J. Fenton of Washington, D. C., I leave five dollars.

All the rest and residue of my estate, real, personal and mixed, of which I may die seized and possessed, whatsoever and wheresoever, of what kind, nature and quality soever the same may be, and not hereinabove given or disposed of, I hereby give, devise and bequeath, unto my nephew and adopted son, Louis Beyer, Junior, and
14 Helen B. Johnson my niece in equal shares, as tenants in common and not as joint tenants, their heirs and assigns, absolutely and forever.

Having full faith and confidence in the honesty, integrity and affection of my said adopted son and of my said niece, I leave them all the property stated herein knowing that they will provide a home

and home comforts for Louis Beyer Senior during his natural life but this is not to be construed to mean that said Louis Beyer Junior and Helen B. Johnson are to be restricted from disposing of any or all of the property if their judgment so dictates but in the event of disposing of all of the property before the death of Louis Beyer Senior they are to always maintain a home and home comforts for my beloved husband, Louis Beyer Senior.

Likewise I make, constitute, and appoint, my adopted son born Charles Lewis Smith but always known as Louis Beyer Junior to be executor of this my last will and testament, hereby revoking all former wills made by me and I request that he be not required to give bond as such executor.

In witness whereof I have hereunto set my hand, subscribed my name and affixed my seal this fourteenth day of July in the year of our Lord one thousand eight hundred and ninety-six in my home at Washington, D. C.

MARY BEYER. [SEAL.]

The above-written instrument was subscribed by the said Mary Beyer in our presence and acknowledge- by her to each of us, and she at the same time published and declared the above instrument so subscribed to be her last will and testament, and we at the
15 testator's request and in her presence and in the presence of each other have signed our names as witnesses hereto and written opposite our names our respective places of residence.

P. J. BRENNAN,
1418 *F St. N. W., Washington, D. C.*
WADE H. ATKINSON,
707 12*th St. N. W., Washington, D. C.*
THOMAS C. SMITH,
1133 12*th St. N. W., Washington, D. C.*

In the Supreme Court of the District of Columbia, Holding a Special Term for Orphans' Court Business.

(Stamp.)

DISTRICT OF COLUMBIA, *To wit:*

I, J. Nota McGill, register of wills for the District of Columbia and *ex officio* clerk of the supreme court of the District of Columbia, holding a special term for orphans' court business, do certify that the aforegoing is a true copy of the original last will and testament of Mary Beyer, deceased, filed August 20th, 1896, fully proven, and admitted to probate and record on the 25th day of September, *1st* 1896.

In testimony whereof I hereunto subscribe my name and affix the seal of the said supreme court, special term for orphans' court business, this 1st day of April, A. D. 1899.

[SEAL.] J. NOTA McGILL.

16 EXHIBIT C. L., "C," TO BILL.

Filed Apr. 7, 1899.

Louis Beyer, Senior, to Cohen and Wolf, Trs. } Recorded May 13, 1897, 12.40 p. m. Trust.

Liber No. 2206, folio 474 *et seq.*; fee, $2.25; st., 10 cents.

This indenture, made this tenth day of May in the year of our Lord one thousand eight hundred and ninety-seven, by and between Louis Beyer, Senior, widower of the city of Washington, District of Columbia, party of the first part and Myer Cohen and Adolph G. Wolf trustees of the city of Washington, District of Columbia parties of the second part. Whereas, the said Louis Beyer Senior is justly indebted unto Carl Schoenhof, in the full sum of two thousand ($2,000) dollars for which the said party of the first part has made and executed one (1) promissory note for two thousand dollars ($2,000) of even date herewith payable five (5) years after date with interest at the rate of six (6%) per centum per annum payable semi-annually to the order of Carl Schoenhof at the Second national bank and ten (10) semi-annual interest notes all dated May 10, 1897, for sixty dollars ($60) each payable to the order of Carl Schoenhof, 6, 12, 18, 24, 30, 36, 42, 48, 54 and 60 months after date at the Second National Bank of Washington, D. C. And whereas, the party of the first part, desires to secure the prompt payment of said debt, and the interest thereon, when and as the same shall become due and payable, together with all costs and expenses that may accrue thereon:

Now therefore this indenture, witnesseth, that the party of the first part, in consideration of the premises and of one dollar, law-
17 ful money of the United States of America, to him in hand paid by the parties of the second part the receipt of which, before the sealing and delivery of these presents is hereby acknowledged has given, granted, bargained and sold, aliened, enfeoffed, released and conveyed and does by these presents give, grant, bargain and sell, alien, enfeoff, release and convey unto the parties of the second part, the survivor of them, his heirs and assigns, the following-described land and premises, situate in the county of Washington, District of Columbia, known and distinguished as lots seventy-one (71) and the full front on Eighth (8th) street extended by a depth of seventy (70) feet of lot numbered seventy-two (72) in Haw's subdivision of part of Mount Pleasant as per plat recorded in the office of the surveyor for the District of Columbia in Liber "C. J. U." folio forty-eight (48) in the county of Washington, District of Columbia, together with all and singular the improvements, ways, easements, rights, privileges and appurtenances to the same belonging or in any wise appertaining, and all the estate right, title interest and claim either at law or in equity or otherwise however of the party of the first part, of, in, to or out of the said land and premises.

To have and to hold, the said land and premises and appurtenances unto and to the only use of the parties of the second part, the survivor of them, his heirs and assigns.

In and upon the trusts nevertheless hereinafter declared, that is in trust to permit said Louis Meyer, Senior, his heirs or assigns, to use and occupy the said described land and premises and the rents, issues and profits thereof, to take have and apply to and for their sole use and benefit until default be made in the payment of one
18 promissory note hereby secured or any instalment of interest thereon when and as the same shall become due and payable or any proper cost, charge, commission or expense in and about the same. And upon the full payment of all the said notes and the interest thereon and all other proper costs, charges, commissions, half commissions and expenses at any time before the sale hereinafter provided for to release and reconvey the said described premises unto the said party of the first part his heirs and assigns at his or their cost. And upon this further trust, upon any default or failure being made in the payment of the notes or of any instalment of principal or interest thereon when and as the same shall become due and payable or any proper cost, charge, commission or expense in and about the same, then and at any time thereafter, to sell the said described land and premises at public auction upon such terms and conditions at such time and place and after such previous public advertisement as the parties of the second part, the survivor of them his heirs or the trustee acting in the execution of this trust, shall deem advantageous and proper: and to convey the same in fee-simple to and at the cost of, the purchaser or purchasers thereof, who shall not be required to see to the application of the purchase-money: and of the proceeds of said sale or sales; first to pay all proper costs, charges and expenses, including all taxes, general and special due upon said land and premises at time of sale, and to retain as compensation a commission of — per centum on the amount of the said sale or sales. Second, to pay whatever may then remain unpaid of the said note and the interest thereon whether the same shall be due or not, and last, to pay the remainder of said proceeds if any there be, to said party of the first part
19 his heirs or assigns. And the said party of the first part, does hereby agree, at his own cost during all the time wherein any part of the matter hereby secured shall be unpaid or unsettled to keep the said improvements insured against loss by fire in the name and to the satisfaction of the parties of the second part, who shall apply whatever may be received therefrom to the payment of the matter hereby secured, whether due or not; and also to pay all taxes and assessments, both general and special, that may become due on or be assessed against said land and premises during the continuance of this trust and that upon any default or neglect to so insure, or pay taxes and assessments any party secured hereby may have said improvements insured and pay said taxes and assessments, and the expense thereof shall be a charge hereby secured and bear interest at the same rate as the said indebtedness hereby secured. And

it is further agreed, that if the property shall be advertised for sale under the provisions of this deed and not sold then the said trustees shall be entitled to one-half the commission above provided to be computed on the amount of the debt hereby secured. In witness whereof, the party of the first part, has hereunto set his hand and seal on the day and year first hereinbefore written.

LOUIS BEYER, Sr. [SEAL.]

Signed, sealed, and delivered in the presence of—
S. WOLF.
EDMUND M. POST.

DISTRICT OF COLUMBIA, *To wit:*

I, Simon Wolf, a notary public in and for the said District of Columbia, do hereby certify that Louis Beyer, Senior, who is
20 personally well known to me as the grantor in and the person who executed the foregoing and annexed deed, bearing date on the tenth day of May, A. D. 1897, personally appeared before me in said District and acknowledged the said deed to be his act and deed. Given under my hand and official seal this 13th day of May, A. D. 1897.

[NOTARIAL SEAL.] SIMON WOLF.

DISTRICT OF COLUMBIA,
OFFICE OF THE RECORDER OF DEEDS, *April* 3, 1899.

This is to certify that the foregoing is a true and verified copy of an instrument as recorded in Liber No. 2206, fol. 474 *et seq.*, one of the land records of the District of Columbia.

[SEAL.] GEO. F. SCHAYER,
(Stamp.) *Dep. Recorder of Deeds.*

Order Setting Cause for Hearing.

Filed Apr. 12, 1899.

In the Supreme Court of the District of Columbia, Holding an Equity Court.

CAROLINE LEFEVRE
vs. } Equity. No. 20324, Docket 46.
LOUIS BEYER ET AL.

Ordered by the court, this 12th day of April, that the prayer for the writ of injunction and order appointing a receiver, contained in the bill of complaint in this cause, be set down for hearing
21 on Tuesday, the eighteenth day of April, 1899, at 10 o'clock a. m., provided a copy of this order be served on the defendants or their solicitors on or before April 14th, 1899.

CHAS. C. COLE,
Asso. Justice.

Answer of Defendant Louis Beyer, Jr., and Response to Rule to Show Cause.

Filed Apr. 18, 1899.

In the Supreme Court of the District of Columbia.

CAROLINE LEFEVRE
vs.
LOUIS BEYER ET AL. } In Equity. No. 20324.

The defendant Louis Beyer, Jr., in his own right and as executor under the last will and testament of Mary Beyer, deceased, for answer to the bill of complaint herein says:

1 to 6. He admits the allegations of paragraphs 1 to 6 of said bill.

7. He admits that said Mary Beyer at the time of her decease was about sixty-five years of age, and that her health had been somewhat impaired for some years prior thereto, but he denies that her mental health was impaired either by physical weakness or by the administration to her of drugs or medicines. He denies that she was in anywise incapable of understanding the ordinary
22 affairs of life or of knowing the value or extent of her estate or her rights in respect thereto. He says she knew exactly the relationship of those connected with her, and that she demonstrated her capability to select the natural objects of her bounty by selecting as her principal legatees and devisees this defendant and Helen B. Johnson. He says that in the very early life of this defendant and said Helen B. Johnson the said Mary Beyer adopted them as her children, took them to live with her and assumed the care of a mother over them; that she became devotedly attached to them and they to her, and that the sisters of the said Mary Beyer were on very distant terms with her, rarely saw her, and in nowise ministered to her or showed any affection for her.

He denies that either prior to or at the time of executing the said will said Mary Beyer was incapable of executing a valid deed or contract.

He also denies that at any time prior to her death she was incapable of freely exercising her mental faculties.

8. He admits that on the 14th day of July, 1896, said Mary Beyer executed and published, in due form of law, the paper-writing of that date, which the defendant, as executor named therein, propounded, and which has been admitted to probate and record by this court.

He denies that this defendant and Helen B. Johnson procured the preparation of said will, but avers the fact to be that some time prior to the execution of said will said Mary Beyer sent for an attorney to prepare her will; that this attorney called in response to her request and took his instructions from her; that he prepared a draft
23 of the will and at a second interview submitted it to her, when she called attention to certain provisions which did not suit

her. The said attorney then took the draft with him and afterwards returned, and at a third interview submitted the corrected paper, which she fully understood, approved, and duly published.

He denies that he in anywise induced said Mary Beyer to sign the said will. He denies that she was importuned by him to sign the same, and says she executed the paper voluntarily and because it expressed her intelligent volition in the premises.

9. He admits that by the said will devises and bequests are made, as averred in paragraph 9 of the bill.

10. He denies that he concealed the contents of said will from said Louis Beyer, or that this defendant was unwilling that said Louis Beyer should be fully acquainted with its contents. He denies that he was party to any scheme to procure execution of said will or that he made any effort to bring about the absence of said Louis Beyer when said will was executed.

11. He admits that Mary Beyer died July 26th, 1896.

12. He admits that said Mary Beyer's personalty was of trifling value, and says that as a result he has largely overpaid her estate, and he denies that her real estate was of any such value as is asserted by complainant, though he says its value is immaterial in this
24 controversy, seeing that complainant has no interest in it.

13. He admits the allegations of paragraph 13 of said bill, except he says that said complainant was duly notified of the application to probate said will and made no objection whatever.

14. He denies that said Louis Beyer soon after probate of said will filed a caveat thereto, which he afterwards dismissed in consideration of a conveyance to him of part of the real estate devised. The truth is that in 1897 said Louis Beyer and the complainant herein, together with Elizabeth K. Maus, filed a caveat, which was dismissed for want of prosecution in February, 1899.

15. It is true that Elizabeth K. Maus executed a quitclaim to her daughter, defendant Helen B. Johnson, but she did so without consideration for the purpose of emphasizing her conviction that the will was and is valid.

16. It is true that Louis Beyer executed a deed of trust, as averred in paragraph 16 of the bill, and that the same was duly recorded as therein averred.

Further answering, this defendant says:

That on the 8th day of February, 1899, the complainant filed her caveat to said will in this court, sitting as an orphans' court, but she has never proceeded thereunder nor procured issues thereon,
25 and said caveat is still pending and undetermined.

Defendant further says that this court, sitting as an orphans' court, has exclusive jurisdiction to determine the validity of said will, if said complainant now has the right to litigate its validity, which defendant denies.

He further says that if complainant has any right to attack said will she also has her full and adequate remedy by an action of ejectment.

And this defendant claims the same benefit of this objection as if raised by plea or demurrer.

Defendant is advised and says that the complainant has not in and by her said bill made or stated any such case as entitles her to the relief sought, or to any relief in this court sitting in equity, and he claims the same benefit of this objection as if raised by demurrer.

Defendant submits the foregoing also as his response to the rule to show cause why a receiver should not be appointed, and claims that the said rule should be discharged.

LOUIS BEYER, JR.
LOUIS BEYER, JR., *Executor.*

JOHN RIDOUT,
Solicitor for Defendant.

I do solemnly swear that I have read the foregoing answer by me subscribed and know the contents thereof; that the facts therein stated as of personal knowledge are true, and the facts therein stated on information and belief I believe to be true.

LOUIS BEYER, JR.

Subscribed and sworn to before me this 18th day of April,
26 A. D. 1899.

[SEAL.] N. CARROLL DOWNS,
Notary Public, D. C.

Answer of Defendant Helen B. Johnson and Response to Rule.

Filed Apr. 18, 1899.

In the Supreme Court of the District of Columbia.

CAROLINE LEFEVRE
vs.
LOUIS BEYER ET AL. } In Equity. No. 20324.

The defendant Helen B. Johnson, for answer to the bill of complaint herein, says:

1 to 6. She admits the allegations of paragraphs 1 to 6 of said bill.

7. She admits that said Mary Beyer at the time of her decease was about sixty-five years of age, and that her health had been somewhat impaired for some years prior thereto, but she denies that her mental health was impaired, either by physical weakness or by the administration to her of drugs or medicines; she denies that she was in anywise incapable of understanding the ordinary affairs of life or of knowing the value or extent of her estate or her rights in respect thereto. She says she knew exactly the relationship of those connected with her, and that she demonstrated her
27 capability to select the natural objects of her bounty by selecting as her principal legatees and devisees this defendant and Louis Beyer, Jr. She says that in the very early life of this defendant and said Louis Beyer, Jr., the said Mary Beyer adopted them as her children, took them to live with her and assumed the care of a mother over them; that she became devotedly attached to

them and they to her, and that the sisters of the said Mary Beyer were on very distant terms with her, rarely saw her, and in nowise ministered to her or showed any affection for her.

She denies that either prior to or at the time of executing the said will said Mary Beyer was incapable of executing a valid deed or contract.

She also denies that at any time prior to her death she was incapable of freely exercising her mental faculties.

8. She admits that on the 14th day of July, 1896, said Mary Beyer executed and published in due form of law the paper-writing of that date, which the defendant Louis Beyer, Jr., as executor named therein, propounded, and which has been admitted to probate and record by this court.

She denies that this defendant and Louis Beyer, Jr., procured the preparation of said will, but avers the fact to be that some time prior to the execution of said will said Mary Beyer sent for an attorney to prepare her will; that this attorney called in response to her request, and took her instructions from her; that he prepared a draft of the will and, at a second interview, submitted it to her, when she called attention to certain provisions which did not suit her. The said attorney then took the draft with him and
28 afterwards returned and, at a third interview, submitted the corrected paper, which she fully understood, approved, and duly published.

She denies that she in anywise induced said Mary Beyer to sign the said will. She denies that she was importuned by her to sign the same, and says she executed the paper voluntarily and because it expressed her intelligent volition in the premises.

9. She admits that by the said will devises and bequests are made as averred in paragraph 9 of the bill.

10. She denies that she concealed the contents of said will from said Louis Beyer, or that this defendant was unwilling that said Louis Beyer should be fully acquainted with its contents. She denies that she was party to any scheme to procure execution of said will, or that she made any effort to bring about the absence of said Louis Beyer when said will was executed.

11. She admits that Mary Beyer died July 26th, 1896.

12. She admits that said Mary Beyer's personalty was of trifling value, and says that as a result said Louis Beyer, Jr., has largely overpaid her estate, and she denies that her real estate was of any such value as is asserted by complainant, though she says its value is immaterial in this controversy, seeing that complainant has no interest in it.

29 13. She admits the allegations of paragraph 13 of said bill, except she says that said complainant was duly notified of the application to probate said will, and made no objection whatever.

14. She denies that said Louis Beyer soon after probate of said will filed a caveat thereto, which he afterwards dismissed, in consideration of a conveyance to him of part of the real estate devised.

The truth is that in 1897 said Louis Beyer and the complainant herein, together with Elizabeth K. Maus, filed a caveat, which was dismissed for want of prosecution in February, 1899.

15. It is true that Elizabeth K. Maus executed a quitclaim to her daughter, this defendant, but she did so without consideration for the purpose of emphasizing her conviction that the will was and is valid.

16. It is true that Louis Beyer executed a deed of trust as averred in paragraph 16 of the bill, and that the same was duly recorded as therein averred.

Further answering, this defendant says:

That on the 8th day of February, 1899, the complainant filed her caveat to said will in this court, sitting as an orphans' court, but she has never proceeded thereunder, nor procured issues thereon, and said caveat is still pending and undetermined.

Defendant further says that this court, sitting as an orphans' court, has exclusive jurisdiction to determine the validity of said will, if said complainant now has the right to litigate its validity, which defendant denies.

She further says that if complainant has any right to attack said will she also has her full and adequate remedy by an action of ejectment.

And this defendant claims the same benefit of this objection as if raised by plea or demurrer.

Defendant is advised and says that the complainant has not in and by her said bill made or stated any such case as entitles her to the relief sought or to any relief in this court sitting in equity, and she claims the same benefit of this objection as if raised by demurrer.

Defendant submits the foregoing also as her response to the rule to show cause why a receiver should not be appointed and claims that the said rule should be discharged.

HELEN B. JOHNSON.

JOHN RIDOUT,
Solicitor for Defendant.

I do solemnly swear that I have read the foregoing answer by me subscribed and know the contents thereof; that the facts therein stated as of personal knowledge are true, and the facts therein stated on information and belief I believe to be true.

HELEN B. JOHNSON.

Subscribed and sworn to before me this 18th day of April, A. D. 1899.

N. CARROLL DOWNS,
[SEAL.] *Notary Public, D. C.*

31 *Answer of Defendants Myer Cohen and Adolph G. Wolf, Trustees.*

Filed Apr. 18, 1899.

In the Supreme Court of the District of Columbia.

CAROLINE LE FEVRE, Plaintiff,
vs.
LOUIS BEYER ET AL. } Equity. No. 20324.

The defendants Myer Cohen and Adolph G. Wolf, to so much of the plaintiff's bill of complaint as it is material for them to answer, answering they say.

They admit to be true the averments of the first and second paragraphs. They can neither admit nor deny the averments of the numbered paragraphs from the third to the fifteenth, both inclusive, but if the same shall be decreed material they will require strict proof thereof. They admit the averments of the sixteenth paragraph, but they deny that there was any pretended conveyance to Louis Beyer, Sr., so far as they are informed. They are informed and believe, and therefore aver, that the deed of trust to them by Louis Beyer, Sr., is a valid lien on said real estate.

Further answering, these defendants say that the complainant has not in and by her said bill made or stated any such case as entitles her to the relief sought or to any relief in this court sitting in equity, and they claim the same benefit of this objection as if raised by demurrer, and the defendants also submit the foregoing as their response to the rule to show cause why a receiver should not be appointed and claim that the rule should be discharged.

MYER COHEN.
ADOLPH G. WOLF.

32 I do solemnly swear that I have read the answer by me subscribed and know the contents thereof, and the facts therein stated of my own knowledge are true, and those stated on information and belief I believe to be true.

ADOLPH G. WOLF.

Subscribed and sworn to before me this 18th day of April, 1899.

J. R. YOUNG, *Clk*,
By R. J. MEIGS, JR., *Ass't Clk.*

Order Discharging Rule and Denying Motion for Injunction and Receiver.

Filed Apr. 18, 1899.

In the Supreme Court of the District of Columbia.

CAROLINE LEFEVRE
vs.
LOUIS BEYER ET AL. } Equity. 20324.

This cause coming on to be heard upon the rule to show cause passed herein on the 12th day of April, 1899, counsel on both sides having been heard, it is this 18th day of April, 1899, ordered that the said rule be discharged and the complainant's motion for a receiver and injunction is denied.

By the court:

CHAS. C. COLE,
Asso. Justice.

33 *Demurrer of Louis Beyer.*

Filed Apr. 24, 1899.

In the Supreme Court of the District of Columbia.

CAROLINE LE FEVRE
vs.
LOUIS BEYER ET AL. } In Equity. No. 20324.

The demurrer of Louis Beyer, one of the above-named defendants, to the bill of complaint.

The defendant Louis Beyer says that the complainant has not stated in her bill such a case as entitles her to any such discovery or relief as is sought for against this defendant; wherefore he demands the judgment of this court whether he shall make further answer to said bill, and prays to be hence dismissed with his costs.

FRANKLIN H. MACKEY,
Sol. for said Def't.

Louis Beyer, being duly sworn, deposes and says that he is the defendant named in the foregoing demurrer, and that the same is not interposed for delay.

LOUIS BEYER.

Subscribed and sworn to before me this 24th day of April, A. D. 1899.

J. R. YOUNG, *Clk*,
By R. J. MEIGS, JR., *Ass't Clk.*

I hereby certify that, in my opinion, the foregoing demurrer is well founded in law.

FRANKLIN H. MACKEY,
Sol. for Def't Louis Beyer.

34 *Memorandum.*

June 20, 1899.—Issues certified to the circuit court for trial by jury by consent.

Certificate of Jury's Findings.

Filed Jan. 17, 1900.

Supreme Court of the District of Columbia.

MONDAY, *December* 11, 1899.

Session resumed pursuant to adjournment, Chief Justice Bingham presiding.

* * * * * * *

The following case was certified to criminal court No. 2, Justice Cole presiding:

CAROLINE LEFEVRE, Plaintiff, vs. LOUIS BEYER and LOUIS BEYER, JR., Executor; Helen B. Johnson, Meyer Cohen and Adolph G. Wolf, Trustees, Defendants.	Issues from Equity. At Law, No. 43492. Equity, No. 20324.

Come here again the parties aforesaid in manner aforesaid, and the same jury return into court and upon their oath say: In answer to the first issue: "First. Was the said Mary Beyer at the time of the alleged execution of the paper-writing bearing date the
35 14th day of July, A. D. 1896, and purporting to be her last will and testament, of sound and disposing mind, memory, and understanding and capable of executing a valid deed or contract?" they answer, Yes.

In answer to the second issue: "Second. Was the execution of said paper-writing bearing date the 14th day of July, 1896, and purporting to be the last will and testament of the said Mary Beyer, procured by fraud, circumvention, or undue influence practiced or exercised upon the said Mary Beyer by Louis Beyer, Jr., Helen B. Johnson, or by either of them, or by any other person?" they answer, Yes.

In answer to the third issue: "Third. Were the contents of the paper-writing bearing date July 14th, 1896, and purporting to be the last will and testament of said Mary Beyer, known to her at the time of the alleged execution thereof?" they answer, Yes.

And the court orders said answers certified to that branch of the court whence said issues came.

Petition for Receiver Pendente Lite.

Filed Jan. 18, 1900.

In the Supreme Court of the District of Columbia.

CAROLINE LE FEVRE
vs.
LOUIS BEYER, JR., ET AL. } Equity. No. 20324.

To the honorable justices of said court:

The petition of Caroline Le Fevre respectfully showeth as
36 follows:

That on April 7th, 1899, she exhibited her bill of complaint in this cause, wherein, among various other prayers, she asked that the last will and testament of Mary Beyer, late of Washington, D. C., might be declared not to have been her last will and testament and might be declared to be vacated, and that pending the litigation of the various facts and issues in this proceedings a receiver might be appointed to take charge of her real estate and collect the rents and profits arising thereout.

2. Your petitioner further represents that the issues to be tried by the jury as to validity of said last will and testament of said Mary Beyer, deceased, were framed and sent by this honorable court to try the fact of the validity of said last will and testament; which issues have been duly tried by a jury and a certificate of the proceedings thereunder has been returned to this honorable court, the findings of said jury having been that the said last paper-writing purporting to be the last will and testament of the said Mary Beyer, deceased, was procured by the undue influence, fraud, and circumvention of certain defendants in this proceedings mentioned.

3. Your petitioner further shows that the said Mary Beyer departed this life on the 26th day of July, 1896, and that from that time up to the filing of this petition no account has ever been made of the rents, issues, and profits of the real estate of which she died seized, which your petitioner avers to amount now in the aggregate to the sum of about four thousand ($4,000) dollars.

4. Your petitioner further shows to the court that the
37 monthly rental of certain of said real estate amounts to about sixty-five ($65) dollars per month, which has been since the death of said Mary Beyer collected by Louis Beyer, Sr., while the rent of other of said real estate, the actual rental of which is to this petitioner unknown, has been collected by Louis Beyer, Jr., and Helen B. Johnson, and this petitioner alleges that the reasonable rental value of said last-mentioned real estate is not less than thirty-five ($35) dollars per month.

Your petitioner therefore prays that an order may be passed by this honorable court appointing a receiver *pendente lite* to take charge of the real estate in these proceedings mentioned and hereafter to

collect the rents, issues, and profits thereof and to manage the same, and that the receiver so appointed may have authority to ask, demand, sue for, recover, and receive the rents, issues, and profits so, as aforesaid, hereto- collected by the said Louis Beyer, Sr., and the said Louis Beyer, Jr., or Helen B. Johnson or either of them, and to bring the money into this court for the further order thereof which the said receiver may so collect or receive.

CLAYTON E. EMIG,
Solicitor for Complainant.

DISTRICT OF COLUMBIA, *ss:*

Clayton E. Emig upon oath says that he has read the foregoing bill of complaint by him subscribed and knows the contents thereof; that the facts therein stated upon his personal knowledge are true and those stated upon information and belief he believes to be true.

CLAYTON E. EMIG,
Solicitor for Comp.

Subscribed and sworn to before me this 18th day of Jan.,
38 1900.

J. R. YOUNG, *Clerk,*
By L. P. WILLIAMS, *Ass't Clerk.*

Rule to Show Cause.

Filed Jan. 18, 1900.

In the Supreme Court of the District of Columbia.

LE FEVRE
vs.
BEYER ET AL. } Equity. No. 20324.

Ordered by the court this 18th day of January, 1900, upon the petition filed herein, that a receiver *pendente lite* be appointed, unless cause be shown to the contrary thereof, on or before the 26th day of January, A. D. 1900, provided that a copy of this order be served upon the defendants or their solicitors on or before the 20th day of January, A. D. 1900.

JOB BARNARD, *Justice.*

Service of copy this 18th January, 1900, is hereby acknowledged.

JNO. RIDOUT,
For Louis Beyer, Jr.
HELEN B. JOHNSON.

39 *Demurrer to Petition and Rule to Show Cause.*

Filed Jan. 26, 1900.

In the Supreme Court of the District of Columbia.

LE FEVRE
vs.
BYER ET AL. } In Equity. No. 20324.

The defendant Louis Beyer, Sr., for answer to the rule to show cause why a receiver should not be appointed of the property involved in this cause, says that there is no rule of equity procedure or practice which entitles the complainant, under the facts stated in her petition and in her bill of complaint, to the appointment of a receiver herein.

FRANKLIN H. MACKEY,
Sol. for Byer, Sr.

Affidavit and certificate waived.

CHAS. POE,
For Compl't.

Answer of Louis Beyer, Jr., to Rule to Show Cause.

Filed Jan. 26, 1900.

In the Supreme Court of the District of Columbia.

CAROLINE LEFEVRE
vs.
LOUIS BEYER, SENIOR, ET AL. } In Equity. No. 20324.

40 The respondent Louis Beyer, Jr., for cause why a receiver should not be appointed in this cause, says:

He admits that on the issues transmitted for trial by jury a verdict has been rendered as stated in the complainant's petition, but he is advised and avers that said verdict is merely advisory and not binding upon the court, even if it has jurisdiction to hear and determine this cause, which he denies.

At the time of the death of the said Mary Beyer this respondent and Helen B. Johnson were living with said Mary Beyer in the dwelling-house on the Brightwood Avenue front of the property described in the bill.

This respondent remained there until May, 1897, when he removed from the premises and remained away until August, 1897, when he returned and remained until December 15th, 1897, when he removed from the premises and did not afterwards return.

This respondent has never collected any rental from said premises.

Said Caroline Lefevre has never, before this suit was brought,

claimed any right to the use or occupation of said premises nor the right to collect rent therefor, and this respondent has never refused to permit her to use and occupy the said premises.

This respondent denies that the rental value of the real estate of which said Mary Beyer died seized since her death amounts to $4,000.

The rental of the part of said premises fronting on 8th street has been collected by Louis Beyer, Senior, and this respondent
41 has never collected any rent therefrom.

The rental value of the house fronting on Brightwood avenue is not more than $25.00 per month.

This respondent is not only a devisee, but an heir-at-law, of said Mary Beyer, and as such heir-at-law would be a tenant in common with said Caroline Lefevre, and as such entitled to the use and occupation of said real estate, and this respondent denies that he is in anywise liable to said Lefevre for use and occupation of any part of the said real estate.

This respondent further says that neither the petition filed herein January 18th, 1900, nor the record in this cause shows any cause why a receiver should be appointed, and he claims the same advantage of this objection as if raised by demurrer.

This respondent makes his answer to the bill in this cause part of this response to the rule to show cause as fully as if said answer were herein repeated.

He further says that an application for a receiver in this cause was heretofore made by said complainant and was refused, and that the complainant is concluded thereby, and he submits that the rule should be discharged and the application for a receiver refused.

This respondent, not admitting, but denying, his liability for any rent of said premises, further says that he has expended for taxes, insurance, and repairs upon said property the sum of $426.51, and that, as executor under said will, he has overpaid the estate
42 the sum of about $250, to the benefit of which payments he is entitled as against said complainant.

This respondent further submits that no order for a receiver can be made in this cause, because Helen J. Fenton and the heirs-at-law of Elizabeth K. Maus, deceased, are not parties to the cause, they being other heirs-at-law of said Mary Beyer.

LOUIS BEYER, JR.

I do solemnly swear that I have read the foregoing answer by me subscribed and know the contents thereof; that the facts therein stated as of personal knowledge are true, and the facts therein stated on information and belief I believe to be true.

LOUIS BEYER, JR.

Subscribed and sworn to before me this 25th day of January, A. D. 1900.

HARRY M. PACKARD,
Notary Public, D. C.

[SEAL.]

43 *Answer of Helen B. Johnson to Rule to Show Cause.*

Filed Jan. 26, 1900.

In the Supreme Court of the District of Columbia.

CAROLINE LEFEVRE
vs.
LOUIS BEYER, SENIOR, ET AL. } In Equity. No. 20324.

The respondent Helen B. Johnson, for cause why a receiver should not be appointed in this cause, says:

She admits that on the issues transmitted for trial by jury a verdict has been rendered, as stated in the complainant's petition, but she is advised and avers that said verdict is merely advisory and not binding upon the court, even if it has jurisdiction to hear and determine this cause, which she denies.

At the time of the death of the said Mary Beyer this respondent and Louis Beyer, Jr., were living with said Mary Beyer in the dwelling-house on the Brightwood Avenue front of the property described in the bill.

This respondent remained there until May, 1897, when she removed from the premises and remained away until August, 1897, when she returned, and has since remained.

This respondent has never collected any rental from said premises. Said Caroline Lefevre has never before this suit was brought claimed any right to the use or occupation of said premises nor the right to collect rent therefor, and this respondent has never refused to permit her to use and occupy the said premises.

44 This respondent denies that the rental value of the real estate of which said Mary Beyer died seized since her death amounts to $4,000.

The rental of the part of said premises fronting on 8th street has been collected by Louis Beyer, Sr., and this respondent has never collected any rent therefrom.

The rental value of the house fronting on Brightwood avenue is not more than $25 per month.

This respondent is not only a devisee, but her mother, Elizabeth K. Maus, deceased, was an heir-at-law of said Mary Beyer. Said Elizabeth K. Maus died on the tenth day of June, 1899, leaving this respondent, Kate Adams, Carrie Maus, daughters, and Louis Maus, a son, her only heirs-at-law, and also leaving surviving her husband, John Maus. This respondent's occupancy of part of said premises has always been with the assent of her said mother and her heirs, as such heir-at-law, said Elizabeth K. Maus, during her life, and after her death her heirs would be tenants in common with said Caroline Lefevre and as such entitled to the use and occupation of said real estate; and this respondent denies that she is in anywise liable to said Lefevre for use and occupation for any part of the said real estate. This respondent is the wife of Atlee Johnson, with whom

she has occupied the said premises, but never to the exclusion of said Caroline Lefevre.

This respondent further says that neither the petition, filed herein January 18th, 1900, nor the record in this cause shows any cause why a receiver should be appointed, and she claims the same advantage of this objection as if raised by demurrer.

This respondent makes her answer to the bill in this cause
45 part of this response to the rule to show cause as fully as if the said answer were herein repeated.

She further says that an application for a receiver in this cause was heretofore made by said complainant and was refused, and that the complainant is concluded thereby, and she submits that the rule should be discharged and the application for a receiver refused.

This respondent further submits that no order for a receiver can be made in this cause, because Helen J. Fenton, an heir-at-law of said deceased, and the heirs-at-law of Elizabeth K. Maus, deceased, are not parties to the cause.

HELEN B. JOHNSON.

I do solemnly swear that I have read the foregoing answer by me subscribed, and know the contents thereof; that the facts therein stated as of personal knowledge are true, and the facts therein stated on information and belief I believe to be true.

HELEN B. JOHNSON.

Subscribed and sworn to before me this 25th day of January, A. D. 1900.

THEODORE L. BAKER.
[SEAL.] *Notary Public, D. C.*

46 *Petition to Make New Party Defendant and Order Granting Same.*

Filed Jan. 30, 1900.

In the Supreme Court of the District of Columbia.

LE FEVRE vs. BEYER. } Equity. No. 20324.

To the honorable judges of the supreme court of the District of Columbia, holding an equity court:

The petition of Caroline Le Fevre, complainant in the above cause, respectfully shows that Helen B. Fenton, a niece, heir-at-law, distributee, and one of the next of kin of Mary Beyer, late of the city of Washington, District of Columbia, deceased, is a proper and necessary party defendant to these proceedings, but that she has heretofore not been made a party hereto.

Your petitioner therefore prays your honors to pass an order making the said Helen B. Fenton a party defendant herein, and au-

thorizing process to issue against her according to the course of the court directing her to be and appear in this court on some certain day to be therein named to make answer (but not under oath, answer under oath being hereby expressly waived) to the bill of complaint hereinbefore in this cause exhibited, and to abide by and perform such order or decree as may be therein passed; and, as in duty, &c.

CHAS. POE,
Sol'r for Compl't.

47 Ordered by the court this 30 day of Jan'y, 1900, upon the foregoing petition filed in this cause, that Helen B. Fenton be, and she hereby is, made a party defendant herein, and that process issue against her as prayed.

JOB BARNARD, *Justice.*

Order Denying Application for Receiver.

Filed Jan. 30, 1900.

In the Supreme Court of the District of Columbia.

CAROLINE LE FEVRE
vs.
LOUIS BEYER ET AL. } No. 20324. Eq.

This cause coming on for hearing on the petition of the complainant for the appointment of a receiver herein *pendente lite*, filed January 18, 1900, and being heard, argued by counsel for the respective parties, and considered, it is this 30th day of January, 1900, ordered that said application be, and the same is hereby, denied.

JOB BARNARD, *Justice.*

48 *Stipulation of Parties as to Testimony, &c.*

Filed Mar. 8, 1900.

In the Supreme Court of the District of Columbia.

LE FEVRE
vs.
BEYER ET AL. } In Equity. No. 20324. Law. No. 43492.

On issues from the equity court—Levre *v.* Beyer.

It is hereby stipulated by and between the parties to this cause that the stenographic report of the testimony and proceedings had on the trial of the above-stated issues before Mr. Justice Cole and a jury and reported by R. S. Boswell, as appears by his affidavit annexed to said report dated the 26th of February, 1900, may, together with the motions for a new trial made by the respective parties and the order of the court made in this matter, appearing in Minutes 40,

page 176, of the records of the court, and also any other and all orders and proceedings passed or had herein, be produced, read, and referred to and considered by the court as part of the record on the hearing in the equity court of this case and in any appellate court to which said cause may be carried by either or any of the parties, and that either or any of the parties may at any time produce and have incorporated into the transcript on appeal to said appellate courts copies of any of the foregoing testimony, proceedings, and orders.

CHAS. POE,
CLAYTON E. EMIG,
Of Counsel for Complainant.
FRANKLIN H. MACKEY,
For Louis Beyer, Sr.
JOHN RIDOUT,
For Louis Beyer, Jr., and Helen B. Johnson.
MYER COHEN AND
ADOLPH G. WOLF, *Trustees,*
By ADOLPH G. WOLF.

HENRY E. DAVIS,
For Louis Beyer, Sr.

49 *Testimony and Proceedings Referred to in Preceding Stipulation.*

Filed Mar. 8, 1900.

In the Supreme Court of the District of Columbia.

In re Estate of MARY BEYER, Deceased.

WASHINGTON, D. C., *December* 6, 1899.

The court met pursuant to adjournment.

Appearances: Charles Poe, Esq., and Victor H. Wallace, Esq., on behalf of the caveators; John Ridout, Esq., and Franklin H. Mackey, Esq., on behalf of the caveatees.

Mr. RIDOUT: As these issues are framed, it would seem that we have the affirmative.

The COURT: Is the execution of the paper admitted?

Mr. RIDOUT: It is not admitted.

Mr. POE: There is no doubt as to the execution of the paper.

The COURT: Where there is no question as to the execution of the paper, when the execution of it is admitted without proof, my recollection is that the presumption arises that the party had knowledge of its contents. That is the law, if I understand it. I have given it to the jury that way.

Mr. POE: It was settled a hundred years ago.

The COURT: In a given case it might be different. Take an illiterate person who is unable to read and write, and a court in such a case as that—that it was incumbent upon the caveatees—

50 that the mere proof of the execution of the paper would not be sufficient to raise a presumption of the knowledge of its

contents. If the question of illiteracy does not enter into it, I should say the law of this jurisdiction is—that is, the Maryland rule—that where the execution of a will is admitted or is proved the presumption arises that the person executing it had knowledge of its contents, and any person contending to the contrary would have the burden upon him to prove to the contrary. Make an order having Caroline Le Fevre the complainant and Louis Beyer *et al.* the defendants in the trial of these issues.

Mr. MACKAY: To make up the record in this case your honor will allow us an exception to that?

The COURT: Certainly.

Mr. Poe having made an opening statement on behalf of the caveators, followed by Mr. Ridout, on behalf of the caveatees, the examination of witnesses was proceeded with as follows:

LOUISE H. STONE, a witness on behalf of the caveators, having been first duly sworn, testified as follows:

By Mr. POE:

Q. State your name to his honor and the gentlemen of the jury. A. Louise H. Stone.

Q. What relation are you to Caroline Le Fevre? A. Daughter.

Q. She is the complainant in this suit; and you are what relation to the late Mary Beyer? A. Niece.

51 Q. Is your father living? A. Yes, sir.

Q. What is his name? A. Charles Le Fevre.

Q. Where do you reside? A. Brookland, D. C.

Q. Of course, you knew your aunt and uncle, Mary Beyer and Louis Beyer, Sr.? A. Yes, sir.

Q. Do you know how long they were married? A. Forty-five years.

Mr. RIDOUT: The witness cannot possibly know that.

Mr. POE: It is a matter of reputation in the family.

The COURT: It is a question whether that is the fact that can be proven by family reputation.

Mr. POE: I do not care for it.

The COURT: There might be some question. Let it go out.

Mr. POE: Yes; let it go out. (To the witness:) Do you remember seeing your aunt in July, 1896? A. Yes, sir.

Q. Whereabouts was it that you first saw her? A. On Brightwood avenue.

Q. Number what, Brightwood avenue? A. I do not exactly know the number.

Q. It was her house, was it? A. Yes, sir.

Q. When had you seen her last before that? A. She had gone away just before she was taken to her bed.

52 Q. How long before July was that—how many weeks? A. I guess just a month.

Q. Whereabouts did you see her at that time? A. She was out to our home—out to see my mother.

Q. Came out to see your mother? A. Yes, sir.

Q. Where was your mother then? A. She was at our home, where we are now.

Q. What part of the house was she in? A. Downstairs in the dining-room.

Q. What was your mother's condition of health at that time? A. She was very ill.

Q. State whether Mrs. Beyer made any statement on that occasion as to the object of her visit.

Mr. RIDOUT: We submit that that is not competent to bind us in any way.

The COURT: Statement about what? I did not catch your full question.

Mr. POE: The statements of the testatrix in relation to her affection for her own sister.

The COURT: If it relate to that, I think it is competent.

Exception noted.

The WITNESS: She was to have gone away for her health, but mother was so bad she did not care about going—did not care about leaving her.

By Mr. POE:

Q. You say that was about a month before you saw Mrs.
53 Mary Beyer at your house? A. At my house.

Q. About a month? A. Yes, sir.

Q. Did she go away? A. Yes, sir; she went.

Q. How long did she stay away? A. She could not have been gone long. She was brought back sick herself.

Q. You saw her again about what time in July? A. Just 14 days before she died.

Q. Where was she then? A. She was in bed.

Q. State all that occurred on that day and occasion. A. I went up to see her, and I afterward came down, and we had an early supper, and Mr. Johnson took us down to the White lot.

Q. What occurred when you were there? Did you see your aunt? A. Yes, sir; I saw my aunt.

Q. State where she was on this day. A. She was in bed, and all she said to me was, "Give my love to your mother and father and sister."

Q. And that was all she said that day. What was her physical condition? A. Very weak.

Mr. RIDOUT: How can this witness answer a question of that sort?

The COURT: She is not going into a diagnosis of the case. She can state whether the testatrix was very ill or only slightly ill.

The WITNESS: She was very ill.

54 By Mr. POE:

Q. When was it that you saw her again? A. After that I went up every other day.

Q. Until when? A. Until she died.

Q. Did you see her on these occasions? A. Certainly I saw her then.

Q. Do you know whether she recognized you or not? A. She did not seem to recognize any one.

Mr. RIDOUT: That is not in answer to the question that is asked. We think that ought to be stricken out.

The COURT: I think that is an answer to the question and a little more. I think that is all right.

Mr. RIDOUT: That is exactly what we object to.

By Mr. POE:

Q. Did she recognize you? A. She did not seem to recognize anybody.

Q. Just state what she did. Did she do anything? Could she move about in her bed? A. No, sir; she could not.

Q. She could not move about in her bed? A. No, sir.

Q. Could she move her head? A. Just about move her head a little from one side to the other.

Q. What hour of the day was this that you were there the first time in July? A. It was toward evening; about two or three o'clock, I think.

55 Q. How did you happen to go away from there on that day? A. The Christian Endeavor was here, and Mr. Johnson drove me down to the grounds before he took me home.

Q. Who was Mr. Johnson? A. Mrs. Helen Johnson's husband.

Q. Did you see anybody else there on that occasion except Mrs. Johnson and your aunt? A. The people about the house—Mrs. Johnson's mother-in-law and a lady from Baltimore.

Q. Where were all of them? A. They were all in the house.

Q. What part of the house? A. I think the mother-in-law was up in the room, but the other lady, I think she was around the house somewhere.

Q. Did you ever hear any conversations between Mrs. Johnson and your aunt with reference to your aunt making a will?

The COURT: You mean Mrs. Beyer?

Mr. POE: Mrs. Beyer, her aunt.

The COURT: You said Mrs. Johnson and her aunt.

(By Mr. POE:)

Q. Your aunt, Mrs. Beyer, I mean, and Mrs. Johnson in reference to making a will? A. No; but I have heard my aunt say often that she would never make a will.

Q. When was it that you heard that? A. I boarded in the house for a couple of years, and I suppose in that time I heard it three or

four different times when we had little disputes, and she said that was the cause of it.

Q. What was the cause of it? A. That Mrs. Johnson——

By Mr. RIDOUT:

56 Q. Whom do you mean by she? A. If anything displeased her my aunt always said it was because she did not make a will, and she never intended to make a will.

Q. If anything displeased whom? A. Mrs. Johnson.

By Mr. POE:

Q. Did you ever have any conversation with your uncle, Louis Beyer, Sr., after your aunt's death with reference to her will?

Mr. RIDOUT: One moment. So far as the client I represent is concerned, that cannot bind us.

Mr. POE: He is a party to the record, first party to the record. We want to prove admissions by him. I want to offer in evidence a caveat which he filed to this very will.

Mr. RIDOUT: I want the record to show very clearly that while there are three caveatees they will necessarily fall into the proofs. Now, any statements made by Louis Beyer, Sr., without going down to the question as to what they may be valuable for, so far as he is concerned, they cannot have any efficacy as to the parties to this proceeding.

Mr. POE: They are all privies by estate. If this will fall they will have no interest.

The COURT: There is no question about Louis Beyer, Sr., being a party here; the question is whether it can be considered by the jury against anybody but him.

Mr. RIDOUT: That is the question.

The COURT: Upon that I think the authorities are not very
57 harmonious. I will admit it, and then, further along in the case, I will instruct the jury whether Louis Beyer Sr.'s declarations are to be taken against the others. It does not make any difference about the admissibility when it was.

Mr. MACKEY: In order that we might contradict, the witness must fix the time.

The COURT: Upon cross-examination you can get the witness down to the time. Whether he ask- her as to the time does not affect the admissibility. He said after the death of the testatrix.

Mr. RIDOUT: We reserve an exception to your honor's ruling.

Mr. WOLF: We reserve an exception, too.

The WITNESS: Yes, sir; he came to our home, and he wanted my mother and the sister in Philadelphia to help him break this will. He said that they were not treating him right.

By Mr. POE:

Q. What did he say they had done to him? A. They had taken his clothes and trunks and set them out in front of the lady's house he was to marry the next day.

Mr. MACKEY: We move that that be stricken out. The witness is asked the question whether she ever heard Louis Beyer, Sr., make any statement about this will. Now, it appears that he went out and asked the witness' mother if she would help him break the will because these persons had put his clothes out on the street.

The COURT: I think it is competent against Louis Beyer, Sr., at all events, and will let it stand.

By Mr. POE:

Q. What did you and Louis Beyer, Sr., and Mrs. Maus do
58 in reference to preparing an attack upon this will and when?

Mr. RIDOUT: To save time——

The COURT: I have some doubt as to whether that is a proper question. What he did—what he said I have no doubt is evidence against him. But not what they did.

Mr. POE: I will withdraw that question. (To the witness:) On what ground did he state that he was going to attack the will?

Mr. RIDOUT: We object to that.

The COURT: I think that is competent.

The WITNESS: Because they were not treating him right.

By Mr. POE:

Q. Did he say anything in reference to Mrs. Mary Beyer's mental capacity?

Mr. MACKEY: We object to that as leading.

The COURT: I think he is permitted to ask the question generally.

Mr. MACKEY: Your honor will give us an exception.

The COURT: Yes.

(By Mr. POE:)

Q. Just answer the question. What did he say about your aunt Mary's capacity? A. He said he did not think she was fit to make a will.

Q. Did he give any reasons why she was not fit to make a will?

Mr. RIDOUT: Is that competent?

The COURT: Yes; I think that is competent.

Mr. RIDOUT: It all comes in under our exception.

The COURT: Yes.

59 The WITNESS: He thought she was too ill and did not know anything about what she was doing.

Cross-examination.

By Mr. MACKEY:

Q. How long have you been living in the District of Columbia? A. All my life. I was born at the Park hotel.

Q. You lived with your mother and father? A. We were all together at that time.

Q. Since your marriage also? A. Yes; I have lived there since my marriage.

Q. And before, and are still living with your mother, Mrs. Le Fevre? A. Yes, sir.

Q. You say that Mrs. Beyer on one occasion called at your mother's house? A. Yes, sir.

Q. Where was Mrs. Beyer living then? A. The Brightwood house.

Q. How far was that from your house? A. We are in Brookland.

Q. And they were living in Brightwood? A. Yes, sir.

Q. Do you know how Mrs. Beyer got to your house? Did she walk out? A. No, sir; she came out in a carriage.

Q. With whom? A. With Mrs. Johnson and her husband.

Q. Was it Mrs. Johnson's carriage that she came in or her
60 own? A. No; it was Mr. Louis', the young man.

Q. Louis Beyer's carriage, the young man—that is, Mrs. Beyer's adopted son? A. I never knew that he was adopted.

Q. Louis Beyer had taken Mrs. Beyer's name? A. After her death, so I understood. He never told it before.

Q. You do not know whether he had the name before Mrs. Beyer's death or not? A. He had the name, but he was not adopted.

Q. That is, you do not know anything about it? A. No, sir.

Q. Mrs. Beyer came out there in Louis Beyer's carriage to see your mother? A. Yes, sir.

Q. Was your mother up and about the house? A. She was sitting up, because she is not able to go to bed. She has to sit up. She cannot go to bed, but has to sit up in a chair.

Q. She was sick? A. Very ill.

Q. How long had your mother been sick? A. For a long time. I do not know exactly. She is sick yet. It has been more than six years.

Q. There was a pleasant greeting? A. Yes, sir.

Q. At that conversation, what did Mrs. Le Fevre say to your mother? Do you remember what she said? A. I do not know exactly what she said. They were both ill and they were both trying to console each other.

61 Q. You were in the room? A. Yes, sir.

Q. And they tried to be as pleasant to each other as possible? A. Yes, sir.

Q. You say you cannot remember what Mrs. LeFevre said to your mother? A. No, sir; I do not. I think she did say tell her sister that she ought to go away, that it might do her good.

Q. Do what? A. Go away. She intended to go to Richmond, and she told her to do it, that it would do her good.

Q. Mrs. Le Fevre told Mrs. Beyer to go to Richmond for her health? A. Yes, sir.

Q. What did Mrs. Beyer say to that? A. She did not think she would go, because my mother was so very ill; but after she got home the others thought it best——

Q. Never mind about that. That was substantially all the con-

versation that was had there? A. I do not know all that passed between them any more.

Q. That was all you heard, at any event? A. Yes, sir.

Q. What else occurred between them you are not able to say? A. No, sir. If called to my attention, I might remember it.

Q. How long did Mrs. Beyer stay there? A. I do not think she was away—I do not remember, but I do not think she was away more than a week.

62 Q. I mean on this visit that Mrs. Beyer made to your mother? A. She generally stayed about a couple of hours. She never came until after our dinner and she had not long to stay.

Q. On this occasion how long did she stay? A. I think about that time.

Q. About a couple of hours? A. Yes.

Q. And then she went back with Louis Beyer? A. With Mrs. Johnson.

Q. In the carriage? A. Yes, sir.

Q. And they parted pleasantly? A. Yes, sir.

Q. When did you next see Mrs. Beyer? A. Fourteen days before she died.

Q. Did you have any conversation with her? A. The only thing she said to me was to give her love to mother, father, and sister.

Q. You went into the room? A. Yes, sir.

Q. Who were in the room? A. Mrs. Johnson's mother-in-law. Mrs. Johnson might have been there; I do not know.

Q. This is the lady of whom you spoke as being from Baltimore? A. No; she is from Richmond. That is where Mrs. Beyer went.

Q. Mrs. Beyer went to Richmond? A. Yes, sir.

63 Q. And then came back from Richmond, and it was after that that you saw her. Right here, let us get the length of time that it was before you saw her the second time. You spoke of her coming to your mother's house in a carriage. When was that? A. I do not think it was more than a month before she died, because I do not think she was away more than a week before they had to bring her back.

Q. I thought you said she was away two weeks? A. She might have been, but I did not say so.

Q. And they brought her back from Richmond? A. Yes, sir.

Q. And you saw her when? A. Fourteen days before she died.

Q. She died on the 26th? A. Yes, sir.

Q. Then you saw her about a week or ten days after that visit—after she visited you or your mother. Is that correct? A. That is what I think. I do not know whether she was away two weeks.

Q. You saw her as soon as she came back? A. No, sir; not as soon. She was home almost a week before we heard she was home.

Q. And then you went over there? A. Yes, sir.

Q. You heard she was sick and you went in the room? A. Yes, sir.

Q. Did she greet you? A. She could not; she was too sick.

Q. She was in bed? A. Yes, sir.

64 Q. You went up and spoke to her? A. Yes, sir.

Q. And she asked how your mother was? A. No; she said give my love to mother and the other sister.

Q. That is all she said? A. That is all she said.

Q. Did you say anything more to her? A. No, sir; it was no use.

Q. Then what did you do? Did you go out of the room? A. Yes, sir; I went out of the room. I stayed there a few minutes and then went out.

Q. You were in the room only a few minutes? A. A very short time.

Q. Did you see this lady from Baltimore there? A. Yes, sir.

Q. What was her name? A. Mrs. Johnson's aunt, Mrs. Boss.

Q. Anybody else in this room beside this lady and you? A. I think Mrs. Johnson was in there.

By Mr. POE:

Q. You mean Mrs. Helen Johnson? A. She may have been there.

By Mr. MACKEY:

Q. You are not certain whether she was there or not? A. No, sir; not certain.

Q. Anybody else? A. Her mother-in-law might have been there.

Q. Whose mother-in-law? A. Mrs. Johnson's—the lady from Richmond.

65 Q. What was her name? A. I think her name was Mrs. Atley Johnson.

Q. You are not sure whether she was there? Did you say you are sure the lady from Baltimore was there? A. Yes, sir; I am pretty sure they were in the room.

Q. Are you sure that Mrs. Helen Johnson was there? A. I think she was in the room.

Q. You think. Are you willing to swear positively to the fact that she was there? A. I could almost do it, because she was generally in the room when I went there.

Q. Your recollection of being there is vague, however, is it not? A. Yes, sir.

Q. And the facts and circumstances that occurred there you cannot relate with any degree of certainty?

Mr. POE: I object.

The COURT: Let her answer that question.

The WITNESS: I am almost certain of it.

By Mr. MACKEY:

Q. But still there is a vagueness in your memory in regard to it? A. I do not think there is.

Q. Have you not just said that? A. I am almost positive that

Mrs. Johnson and all of them were in the room every time I went there—in and out of the room all of the time.

Q. You are not positive, then, that they were there—you are not absolutely positive that they were there? A. They must have been. I cannot say positively that they were there.

66 Q. You say you heard your uncle, Louis Beyer, Sr., say something. When was that? A. My aunt——

Q. Louis Beyer, Sr., the old gentleman, the husband of this lady who died. You say you heard him say something about wanting the will broken? A. Yes; he came on to see us.

Q. How long was that after the death of Mrs. Beyer? A. I cannot remember dates. I do not remember the date.

Q. I do not want the date. Can you not tell us about how long it was?

The COURT: Whether it was a month, a few months, a year, or less. That is what counsel wants.

(By Mr. MACKEY:)

Q. I do not want the date; I want to know about how long it was after the death of Mrs. Beyer that you heard this conversation, A. I do not know whether it was a month or two after that. I cannot say.

Q. Was it a month after? A. A month and more.

Q. Was it two months? A. I could not say positively.

Q. Would you say it was three months afterward? A. I could not say.

Q. Would you say it was four months afterward? A. I cannot answer. I do not know.

Q. Could you say it was six months after Mrs. Beyer's death that you heard Louis Beyer, Sr., say this? A. No, sir; I cannot.

67 Q. Would you venture to say it was eight months after her death? A. I really cannot answer.

Q. So that you really do not know whether it was eight months or a year? A. It was not a year.

Q. But you do not know whether it was a month or eight months after her death? A. No, sir.

Q. He came out there. Whom did he see? A. My mother. He saw us all. We were all there—father and mother and I.

Q. Where in the house did this conversation occur? In the parlor? A. In the dining-room.

Q. You were there? A. Yes, sir.

Q. And your mother? A. Yes, sir.

Q. And father? A. Yes, sir.

Q. You passed the greetings of the day, of course. How long had Mr. Beyer been there before he made this proposition of which you spoke? A. He just came out for that purpose and he went to talking about it.

Q. He told them what had been done to him. What did he say had been done to him? A. He said he was not treated right.

68 Q. By whom? A. By Mrs. Johnson and Mr. Beyer, both.

Q. He was then living with them, was he not? A. Yes, sir.

Q. In what respect did he say he was not treated aright? A. He said he did not have any home there at all; he had no home.

Q. He did not mean that they had kicked him out of the house, did he? A. He did not say that then, but he did later.

Q. He did not say then that he had been put out of the house at all? A. I think it was a very short time after that that he came out and said his clothes and everything had been put out.

Q. I am not speaking of this occasion. Did Mr. Beyer appear to have his feelings soured? Was he cool and calm in talking to you about this or was he rather in a passion and vexed? A. I do not think he was in a passion, because he came out three Sundays in succession and took dinner with us and talked each time on that subject.

Q. He said that Mrs. Helen Johnson and Mr. Beyer, Jr., these adopted children, or these people who have been called adopted children of Mr. Beyer, Sr., had not treated him aright, and he was going to break the will. Is that the substance of what he said? A. Yes, sir; he said he wanted her sisters, rather, to get what was belonging to them.

Q. He wanted what? A. Justice done.

Q. He wanted Mrs. Le Fevre to get what was coming to
69 her or what he thought she ought to have? A. Yes, sir.

Q. You said he stated that they had put his clothes out on the street? A. That is what he told us, that his clothes had been set out in front of the house of the lady whom he afterward married.

Q. Did he appear to be mad about that? A. He did not like it. It could not have been anything else but unpleasant.

Q. He was mad, and so expressed himself, indignant about it? A. Yes, sir.

Q. And he had the manner of an indignant man at the time? A. Of course, if he was acting so he had the manner of it.

Q. Did Mr. Beyer, Sr., say anything else? A. I do not know that he only talked on that subject.

Q. What did you folks say to him in reply to that? A. We never thought that our aunt had made such a will in the first place.

Q. I do not care what you thought, but what did Mrs. Le Fevre, your mother, say about it? A. She told him that she would help him out.

Q. Did you ever hear your mother say that she never thought that Mrs. Beyer made that will? A. She said she never thought that Mrs. Beyer would leave her that way; that she herself had never done anything that way.

70 Q. And she expressed her dissatisfaction with the will? A. Yes, sir; expressed dissatisfaction.

Q. Did not like the way the will was made and did not think Mrs. Beyer ought to have made such a will? A. Yes, sir.

By Mr. RIDOUT:

Q. On the occasion when you made the visit on Sunday, the 14th of July, I understand you to testify that you are positive Mrs. Johnson's mother-in-law and Mrs. Boss were at Mrs. Beyer's house? A. I think Mrs. Johnson came that very day.

Q. You mean Mrs. Helen B. Johnson's mother-in-law. A. Yes, sir.

Q. How about Mrs. Boss? A. I think she was there.

Q. You are not positive, however; you will not say positively? A. No, sir.

Q. Was Mrs. Boss engaged there as a nurse? When did she come? A. So they say.

Q. You were there every other day, I understood you to observe? A. She was there.

Q. She was apparently discharging the duties of nurse, was she not? A. Yes, sir.

Q. At that time she was attending to the housekeeping? A. I suppose Mrs. Johnson was.

Q. Young Mrs. Johnson? Mrs. Beyer was in a condition,
71 as you say, when she needed nursing? A. Yes, sir.

Q. On the occasion of your visit on that Sunday, do you remember whether you took tea or not? A. I took supper there.

Q. About what time in the afternoon was that? A. We got an early supper, because we were to be taken out riding. I was taken down to the Christian Endeavor encampment.

Q. You wanted to go down? A. I was asked if I wanted to go.

Q. You wanted to go? A. After I was asked.

Q. It was a custom of Mrs. Johnson to take you home in the dayton? A. It was customary.

Q. And on this occasion he took you home ultimately? A. Yes, sir; when we went around to the grounds.

Q. Who else went around with you? A. Mr. Johnson's children.

Q. You drove down to see the Christian Endeavor encampment, and then went home? A. Yes, sir.

Q. About what time did you leave the house to go to the encampment? A. I do not know exactly. It might have been three or four o'clock—somewhere along there.

Q. You have spoken of some statements made by Mrs. Beyer to the effect that she did not intend to make a will. Were any such statements ever made in the presence of Mrs. Johnson?
72 A. I do not just recall Mrs. Johnson.

Q. Can you give the date when one of those statements were made? A. It was in the last two years that I boarded there and I guess that was about a year before I went to Brookland.

Q. How many years before her death was the last occasion when you heard her make that statement? A. A year or so, I guess.

Q. A year or so before her death? A. Yes, sir.

Redirect examination.

By Mr. POE:

Q. I omitted to ask this witness one question in my examination-in-chief. I wanted to ask if you know what was the nature of the medicine. Do not answer this unless you know it from Mrs. Johnson or Mr. Beyer or Mr. Louis Beyer, Jr. Do you know the nature of the medicine that was given to Mrs. Beyer, your aunt, during this last sickness, in July, 1896? A. Yes, sir.

The COURT: From whom did she learn it?

By Mr. POE:

Q. From whom did you learn it? A. From Mrs. Johnson.

Q. You may state what it was that Mrs. Johnson said of the medicine—what medicine was used? A. She said it was morphine and champagne.

Q. Was that all that was said? Did she give any reason for that being the treatment?

Mr. RIDOUT: We are going to have medical witnesses. How can this lady know?

73 Mr. POE: This is one of the admissions of the parties.

The COURT: The reason why?

Mr. POE: Yes.

The COURT: I think that is competent.

Mr. RIDOUT: Yes; I think so.

(By Mr. POE:)

Q. State why. A. The reason why was to give her relief.

Q. Do you know what was the nature of her complaint? I do not mean specially, but generally. A. A liver complaint. That is what I understood. In the first place, a sort of Bright's disease.

Q. Mrs. Johnson told you they were giving her morphine and champagne. A. Yes, sir.

Q. When was that conversation? A. When she was dying—the last three days.

Recross-examination.

By Mr. MACKEY:

Q. When was that told you? A. In the last few days—when she took to her bed.

Q. What do you mean by the last few days? A. When she was sick in bed the last time. She had been ill for years.

Q. When did they commence to give her morphine and champagne, after she took to her bed; how long before her death? A. They told me that that was the medicine they were giving her to relieve her. There were no hopes for her, and they were giving her that to relieve her.

74 Q. You do not remember about how long that was before her death? A. The whole time I was going there that she was taking this medicine.

Q. How long was she in bed? A. I saw her 14 days before she died. I went up there every other day.

Q. When did you hear Mrs. Johnson say this? A. Why, when I was going to see my aunt, of course. She said that was the medicine she was taking.

Q. Were you there after that time—you were there 14 days before her death? A. Yes, sir; every other day.

Q. Every other day up to the time of her death? A. Yes, sir; up to the time of her death.

Q. On what occasion was it that Mrs. Johnson said this? A. When they were giving her this medicine I know that there was no hope for her, and this was given to her to give her relief.

Q. Was that the first visit or last? A. It was not the first or the last, but during the time. The first visit was 14 days before her death.

Q. And then you went every day? A. Every other day.

Q. And then the next time you went to see her was about 12 days before her death? A. Yes, sir.

Q. And you went every other day before her death; on which one of these visits was it that Mrs. Johnson said they were giving
75 her morphine and champagne to relieve her? A. She said they were giving her that all along; ever since she had taken to her bed.

Mr. Poe: I desire to offer in evidence a caveat to this will which was filed by Louis Beyer, Sr., and this other sister in the special term of this court for orphans' court business. The caveat was filed on the 14th of August, 1897. I desire to read it to the jury.

Mr. Ridout: That is peculiarly subject to the objection that it is not binding on my clients. This is the proceeding of certain persons, — Mr. Louis Beyer, Sr., in respect of which my clients were respondents.

After discussion:

The Court: I will not rule upon this point now. I will hear the rest of your evidence, and you may withdraw this for the time being. Later in the trial and before you close, if you still think you are entitled to this, call my attention to it; but let me know more about the case. It is a new question—new to me. I have had considerable to do with this class of cases in the last ten years, and I have travelled over this ground thoroughly, but on this point I am not satisfied. I will think about it.

Mr. Poe: We desire to offer in evidence a caveat to this will which was filed by Louis Beyer, Sr., in the special term of this court for orphans' court business. It was filed on the 4th of August, 1897. We desire to offer it in evidence and to read it to the jury.

Mr. Ridout: That is peculiarly subject to objection as not binding on my clients. This is a proceeding of certain persons,
76 among whom is Mr. Louis Beyer, Sr., and in which my clients were respondents. It seems to me that the petition filed by the actors against my client could not, in the aspect of the law of

evidence, be admissible as against them. I insist that it is not only admissible against us, but our answer should be admitted.

After discussion:

The COURT: I will tell you what I think. I will not rule upon the question now. I will hear the rest of your evidence. Withdraw this for the time being, and before you close, if you still think you are entitled to it, let me know after I shall have heard more about the case. It is a new question, new to me, though I have had considerable to do with this class of cases in the last ten years. I have travelled over this ground pretty thoroughly. I am not satisfied; I will think about it.

FANNY PERRY, a witness on behalf of the caveators, having been first duly sworn, testified as follows:

By Mr. POE:

Q. Your name is Fanny Perry? A. Yes, sir.
Q. Did you know Mrs. Mary Beyer? A. Yes, sir.
Q. And Mr. Louis Beyer, her husband? A. Yes, sir.
Q. And Mr. Louis Beyer, Jr.? A. Yes, sir.
Q. Did you know Mrs. Helen Johnson? A. Yes, sir.
77 Q. Did you know Mrs. Le Fevre? A. Yes, sir.
Q. Mrs. Stone? A. Yes, sir.
Q. Did you use to live with Mrs. Beyer? A. Yes, sir.
Q. How long did you live with her? A. I lived with her about three years.
Q. Whereabouts did you live with her? A. Number 2258 Brightwood avenue.
Q. How old are you? A. I am 20 years old.
Q. How long did you live with Mrs. Beyer? A. I lived with her about three years.
Q. Before her death? A. Yes, sir; up until the time of her death.
Q. Did you live there afterwards? A. Yes, sir.
Q. How long afterward? A. I did not stay there more than three months after her death, I do not think.
Q. Did you go back again after that three months to live with Mrs. Johnson? A. Yes, sir.
Q. In the same house? A. Yes, sir.
Q. You lived there as a servant, did you not? A. Yes, sir.
Q. Did you use to be there all day and all night, or only during the day? A. The first time I stayed morning and evening
78 and helped her around, after school, and after Mrs. Beyer got real sick I stayed there all day.
Q. Do you remember whether Mrs. Beyer went to Richmond in 1896, just about a month before she died? A. Yes, sir; I remember that.
Q. How long did she stay in Richmond? A. I was not there the day she left, but I do not think she stayed much over a week.
Q. What time did she get back? A. She got back the last of June.

Q. Did you see her when she came back? A. Yes, sir.

Q. What was her health then? Was she well or sick? A. No, sir; she was very sick.

Q. Did she go to bed right then? A. No, sir; not right then.

Q. How long was she about the house before she did go to bed? A. I do not think she was about the house more than a week before she went to bed.

Q. Do you remember the day she went to bed? A. I do not remember the day she went to bed.

Q. Was it before or after the Fourth of July? A. After the Fourth of July.

Q. How long after the 4th of July? A. One or two days after the Fourth of July.

Q. You remember when she died? A. Yes, sir.

Q. How often did she get out of the bed after she went to bed before she died? A. She was out of bed once.

79 Q. When was that? A. Why, it was in the morning when I was making the bed. She just sat up long enough for me to make the bed.

Q. You used to make the bed for her? A. Yes, sir.

Q. Did you use to wait on her? A. Yes, sir; I waited on her part of the time.

Q. Was she very sick or just a little bit sick? A. She was very sick.

Q. Did she get better or worse between that time and the time she died? A. She got worse.

Q. Do you remember a good many people coming there one day to see Mrs. Beyer about two weeks before she died? A. Yes, sir.

Q. Just state to the gentlemen of the jury and his honor what her condition was on the day that these people came to see her? A. The day the people came to see her she was very weak, and she was unable to sit up or help herself at all.

Q. Could she talk? A. She could talk, but not loud. You had to hold your ear down to her mouth to hear what she had to say.

Q. Did you give her medicine during that time? A. Yes, sir; I gave her medicines.

Q. You say she did not get up out of bed at all again? A. No, sir.

Q. Did she talk to you? A. No, sir; she did not have anything to say to me; only sometimes when I would speak to her

80 she would just whisper good morning or something like that—no conversation.

Q. Just tell us what occurred, in your own way, on this day that these people came to see her about two weeks before she died. A. The day the people came to see her I was not there; I had gone home to get ready to go to Sunday school, and Mrs. Johnson came to me to get me to help her to get supper.

Q. Mrs. Helen Johnson? A. Yes, sir; Mrs. Stone was there. I was going up into Mrs. Beyer's room, and I met Mr. Louis Beyer in the hall.

Q. Which Mr. Beyer? A. The young man.

Q. Junior? A. Yes, sir.

Q. You met him in the hall? A. Yes, sir.

Q. What was he doing? A. He was going to the room with a pen and ink. He did not allow me to go into the room. She said, "You go downstairs, and after you get the wagon hitched up take Mrs. Stone around to the Christian Endeavor encampment first and then take her home; if she knows what is going on here, she won't leave here tonight unless she gets a share in the profits."

Q. How many persons were there on that occasion? A. I do not know exactly the number. I did not see any of the people who were in the room. I did not go into the room, but I know Mrs. Stone was there.

Q. Did you see any buggies or anything of that kind around the house? A. Yes. sir.

81 Q. How many? A. One buggy out front and two in the back.

Q. Did you ever hear Mrs. Johnson and Mrs. Beyer talking about a will? A. Yes, sir.

Q. What did Mrs. Johnson say to Mrs. Beyer, and what did Mrs. Beyer say to Mrs. Johnson? A. I have heard Mrs. Johnson ask Mrs. Beyer to make a will, but Mrs. Beyer said she would not make a will; that everything would be left to Mr. Beyer just as it was, and for them to stay with Mr. Beyer and treat him right, and when he died he would do right by them.

Q. What did Mrs. Johnson say then? A. "This is the way you are going to treat me after I have been working for you all these years, and this will be all the thanks I'll get for doing it."

Q. Did you ever hear any conversations between Mrs. Johnson and Mr. Louis Beyer, Jr., about getting Mrs. Beyer to make a will? A. Yes, sir.

Q. What were those conversations? A. I heard Mrs. Johnson ask Mr. Louis to go and see about getting a will made when she got after Mrs. Beyer to make a will. She asked him to go and see what is to be done if she were to die and the will were not made. He went, and I heard him tell her that Mr. Beyer, Sr., and her sisters could come in and take possession of everything. She said then that she would see that a will was made.

Q. Now what else did you hear, any other conversation, about this time. When first did this last conversation take place; was it before or after Mrs. Beyer went to Richmond? A. It was

82 before she went to Richmond.

Q. Did you hear any conversations after she came back from Richmond? A. I heard Mrs. Johnson, after Mrs. Beyer was in bed, ask her to make a will. She said she would not make a will, but would leave it to Mr. Beyer. Mrs. Johnson said, "Yes, you will leave it to him, and he will sink it in a boat or rum mill." Mrs. Beyer said, "Nellie, how can you talk about your uncle like that?" Mrs. Johnson was after her to make a will, and she said she would not make it, and she said, "Nellie, you are harassing me to death." Mrs. Johnson said she would go if the will was not made; Mrs.

Beyer said, "You have run Mrs. Stone out of the house to get something when I die. You said she was waiting for a dead man's shoes, but you are the one to catch it."

Q. Were you there on the day of the funeral? A. Yes, sir.

Q. Were you there when they came back from the funeral? A. Yes, sir.

Q. Did you hear any conversation between Mrs. Johnson and Mr. Louis Beyer, Sr., about a will on that day? A. Yes, sir.

Q. What was that conversation? A. I was going upstairs to get a dress for the baby, and I saw Mrs. Johnson in the dining-room, and Mr. Beyer was sitting at the table. She went to him and put her arms around his neck and said, "The will is made," and he said it was not so. She said it was, and put her arms around him again, and he pushed her away.

83 Q. Who gave Mrs. Beyer her medicines during her last sickness? A. Why, sometimes I gave her medicine, and Mrs. Johnson.

Q. Did you know what kind of medicines they were? A. I only knew from what I heard said.

Q. Who said it? A. Mrs. Beyer.

Q. What did she say about the medicine they were giving her? A. She said the medicine they were giving her was doing her no good; most of it was morphine, to deaden her nerves, but nothing to build her up.

Q. What time did you get there on the morning that these people were there? A. I came in to work about half past six o'clock.

Q. Did you see Mrs. Beyer when you got there? A. Yes, sir.

Q. Did you go to the room when you went in? A. Yes, sir.

Q. What was her condition; could she talk to you? A. She did not say anything, if she could.

Q. Did you give her anything on that day? A. No, sir; I did not give her anything. Later in the day I gave her something.

Q. What did you give her? A. She had some champagne, and I gave her champagne. I had an egg, and I beat that up and gave it to her.

By Mr. MACKEY:

Q. Was that before or after the will was made? A. That was the same day.

By the COURT:

84 Q. Was it before or after the will was made that you gave her the champagne and egg? A. I gave it to her in the morning.

By Mr. POE:

Q. What time was it that these people got there? A. About four o'clock.

Q. Were you up there during the day? A. I went up off and on during the day. When they came down to get their dinner I was

up there, and I did not go any more until I went and told her good afternoon and went to get supper, and then she seemed to be asleep, and I did not bother her.

Q. How often did you see Mrs. Beyer after that before she died? A. I saw her every day before she died. That evening I went up *right late, because I did* not leave there until 8 o'clock that night.

Q. Do you know what doctors were attending her? A. I knew Dr. Smith was attending her.

Q. Did you hear any conversation between Dr. Smith and Mrs. Johnson about a will? A. I heard Dr. Smith ask Mrs. Johnson if she were going to get something after waiting on Mrs. Beyer, being so faithful to her, and Mrs. Johnson said she didn't know. Then Dr. Smith said if something was not left to her he would help her and see that something was left her.

Cross-examination.

By Mr. MACKEY:

Q. When did you say Mrs. Beyer went to Richmond—how
85 long before her death? A. Before her death?

Q. Before the death of Mrs. Beyer how long was it that she went to Richmond? A. She went to Richmond in June, but I do not know what part.

Q. You do not know whether it was the first or latter part? A. It was the latter part.

Q. Are you sure that she went to Richmond? A. That is what they said. I do not know.

Q. Do you not know that it was St. George's island where she went? A. I know she went to St. George's island once.

Q. Was not that the time she went to St. George's island? A. No, sir.

Q. When she came back she did not take to her bed for about a week? A. It was about a week before she went to bed.

A. After she took to her bed how long was it before these gentlemen came there to make this will? A. I do not think it was more than two weeks—not quite two weeks.

Q. It was not quite two weeks after she took to her bed that these gentlemen came there to have her make a will? A. Yes, sir.

Q. Were you in the room? A. No, sir.

Q. You were not in the room at all when the will was
86 made? A. No, sir.

Q. Were you in there that day? A. Yes, sir.

Q. I think you said you fixed some champagne and egg for Mrs. Beyer in the morning? A. Yes, sir.

Q. How was she then? A. She seemed to be very weak. She did not say anything to me.

Q. She took the champagne and egg. A. Yes, sir.

Q. Did she sit up and drink it? A. No, sir; she could not sit up.

Q. What time of day was it that these persons came? A. It was about four o'clock.

Q. You went out of the room? A. Yes; I was not in the room.

Q. When they came? A. No, sir; I was not in the room.

Q. Would Mrs. Beyer seem bright at times and more sick at other times—not so bright? A. No, sir; she did not seem to be bright at all.

Q. Her condition would be changed sometimes for the better and sometimes for the worst, would it not? A. No, sir; she got worse.

Q. Worse all the time? A. Yes, sir.

Q. Did she ever tell you to get anything for her? A. No, sir. All she could do was that she would move her lips. I knew what she wanted—ice water on the lips.

87 Q. That was close to her death? A. Yes, sir; that was close to her death, because for two weeks she laid there she did not say anything—could hardly speak or move. She would speak very soft when she did.

Q. That was about two weeks before her death? A. Yes, sir.

Q. Before that she had been talking some? A. She did not talk much.

Q. She talked some? A. Yes, sir.

Q. You understood what she said? A. You could if you put your ear close to her mouth.

Q. You understood her even after the will was made; you understood what was said, even though she said it in whispers? A. Yes, sir.

Q. What would she say? A. She would ask for things.

By Mr. RIDOUT:

Q. What day of the week was it that you saw some persons come there? A. It was on Sunday.

Q. Do you remember the day of the month? A. No, sir; I do not remember exactly what day of the month it was.

Q. Do you remember who the people were? A. No, sir; I did not see any; I did not go into the room.

Q. How did you know anybody was there? A. Because I was going up the steps, and when I got near the door I met Mr. Louis, and he told me I could not go in the room.

88 Q. That was the only reason? A. No, sir; not the only reason.

Q. What was the reason? A. When I went downstairs I heard Mrs. Johnson say to get Mrs. Stone and carry her around to the Christian Endeavor meeting. If she knew what was going on she would not leave unless she had a share in the profits.

Q. Do you remember when you first told anybody that you heard that remark made? A. That I told?

Q. Yes. Whom did you first tell that you heard that remark made? A. I think it was to Mr. Beyer.

Q. The old gentleman? A. I know I did tell it to him. I think it was to Mr. Beyer.

Q. When did you first tell anybody connected with Mrs. Le Fevre or anybody else? A. It was in July, I think—yes; in July.

Q. Shortly after the death of Mrs. Beyer? A. Yes, sir; it was after Mrs. Beyer's death.

Q. That you told Mrs. Le Fevre? A. I did not tell Mrs. Le Fevre; it was the old gentleman.

Q. You say you heard conversations between Mrs. Beyer and Mrs. Johnson about a will? A. Yes, sir.

Q. When was the first time you heard any conversation? A. It was during the winter. I do not know what time it was; but I know it was in the winter.

89 Q. The winter before she died? A. I do not know whether it was the winter before she died. I heard them talk about it. I do not know what day it was or the year.

Q. But it was in the winter? A. Yes, sir.

Q. The winter before Mrs. Beyer died? A. Yes, sir; I think it was in the winter before she died. Yes, sir; I think it was.

Q. Was Mrs. Stone living there then? A. No, sir; Mrs. Stone had moved.

Q. Do you remember seeing Dr. Smith at Mrs. Beyer's on the Sunday that you spoke of? A. I think he was there in the morning.

Q. You do not know whether he was there in the afternoon? A. Mrs. Johnson said Dr. Smith came to bring some of his friends; that is what she told Mrs. Stone. So he must have been there; but I did not see him.

Q. Was Mrs. Stone there on that Sunday? A. Yes, sir; Mrs. Stone was there, and she asked what those buggies were there for, and she said that Dr. Smith had some friends to see Mrs. Beyer. When she went outside she said, There is the polo wagon——

Q. Why are you so anxious to repeat that? That is the third time you have referred to it. A. I am not anxious to repeat it. It all came in together.

Q. Where are you employed now? A. Mertz building—janitress.

90 Q. You say that on this occasion there was a number of carriages standing out in front. How many were there? A. One in front; two in the back. One, Mr. Louis', Sr., the polo wagon——

Q. Did all three of them have horses hitched to them? A. Yes, sir.

Q. You are positive that on this occasion there were three buggies there, one of Mr. Louis Beyer's and two of somebody's else? A. Yes, sir.

Q. That was on the Sunday that all these people came? A. Yes, sir.

Redirect examination.

By Mr. POE:

Q. You say that you first told persons about these conversations some time in July, 1897? A. Yes, sir; in July.

Q. Where were you then? A. I was at the Freedmen's hospital.

Q. How did you happen to make these statements to these persons and who were they? A. They came over there and they were asking me some questions.

Q. Who were the persons? A. Mrs. Stone, for one, and Mr. Beyer and Louis—I do not know that he was. I do not think that there was anybody else there.

Q. Was Mrs. Maies there? A. I do not know whether she was there that day or not; no, sir; she was not there that day.

91 Q. Did they tell you why they wanted you to make the statement? A. No, sir.

Q. Did you make the same statement then that you have made here? A. Yes, sir.

Q. Did you swear to it? A. Yes, sir.

Q. Before a notary public? A. Yes, sir.

Q. How many times did they come to see you? A. He only came once.

Q. How many times did Mr. Louis Beyer, Sr., come to see you?

Mr. RIDOUT: All the testimony with regard to what Mr. Louis Beyer, Sr., did comes in under our objection. We wish to save the point.

The COURT: Yes.

(By Mr. POE:)

Q. How many times did he come? A. Once.

Q. Did he say anything about the will then? A. I do not know that he was going to have anything done to the will, only he asked me some questions, and I answered them. Then he came again. The first time I saw Mr. Beyer after that—I happened to come out of the hospital for a walk—he came over to the hospital, but he did not tell me what he was going to do.

Q. He did not tell you at the hospital what he wanted you to do? A. No, sir; he did not tell me what he intended to do—not that I remember.

92 Q. He did not tell you then that he wanted you as a witness? A. No; he did not say then.

Recross-examination.

By Mr. MACKEY:

Q. When you were living at the house there with Mrs. Beyer, you say you were there about three years? A. Yes, sir.

Q. Was Mrs. Johnson living there at that time? A. Yes, sir.

Q. Was Mr. Louis Beyer, Jr., living there at that time? A. Yes, sir.

Q. Both of them were living there? A. Yes, sir.

Q. Were they on friendly or unfriendly terms? A. They were on friendly terms. Mrs. Stone was in the house, too.

By Mr. RIDOUT:

Q. Have you ever lived at Mrs. Stone's house; and, if so, when? A. Yes, sir. I do not know exactly what year it was, but I think in 1898.

Q. How long did you live there? A. I lived there three months and one week.

GUSTAV FACIUS, a witness on behalf of the caveators, having
93 been first duly sworn, testified as follows:

By Mr. POE:

Q. You are a minister of the gospel and now in charge of the German Reform church at the corner of—— A. Yes, sir.

Q. Did you know Mary Beyer during her lifetime? A. Yes, sir.

Q. How long had you known her? A. I knew her about nine years, but I never came in contact with her until close to her death.

Q. When was it you saw her, in and about the month of July, 1896? A. As far as I can recollect, it must have been the second week in July—the beginning of the week.

Q. Where did you see her? A. I was in her room.

Q. You were there as her spiritual adviser? A. Yes, sir; I was called there as such.

Q. Was she in bed or not? A. She was in bed.

Q. I suppose you said a prayer for her—had religious service there, did you? A. Yes, sir; I offered a prayer.

Q. What was her physical condition at that time? A. She was very sick.

Q. How many times did you visit her after that and before her death? A. I cannot tell exactly—I do not recollect exactly, but it may have been four or five times.

94 Q. On any of those occasions, was she up out of bed? A. No, sir; I always found her in bed.

Q. Was she getting better or worse? A. I could not tell that.

Q. She died on the 26th of July? A. So I understood.

Q. You officiated at her funeral, did you not? A. Yes, sir.

Q. Do you remember whom else you saw on these visits that you made there? A. Requested me to come there?

Q. No; whom did you see when you went there? A. There were several persons about the room, particularly one lady whom I knew, from Baltimore, a certain Mrs. Boss. She was there, and the others were more or less not familiar to me.

Q. Could Mrs. Beyer move about in bed? A. Yes, sir; I saw her move about.

Q. Did she move her body or merely her head? A. I do not know; she was moving about.

Q. Do you mean tossing about in her bed or just moving about? Was she in pain? A. I do not know that she was in pain much; I did not hear her moan. At least while I was there I did not hear her.

Cross-examination.

By Mr. MACKEY:

Q. You say you first saw Mary Beyer the second week in July? A. Yes, sir.

95 Q. That would be about the 14th or 15th? A. About three weeks; not a week before her death.

Q. She died on the 26th of July? A. Yes, sir.

Q. Three weeks before her death—that would bring *her* up to about the 6th of July before you went there? A. Yes, sir; something about like that. I do not recollect, but it was something like that time.

Q. She wanted you because you were a German minister? A. Yes, sir.

Mr. POE: The witness did not say that she wanted him.

Mr. MACKEY: I asked him that. (To the witness:) She herself was German?

A. So far as I understand, she was German descent. I understand she was born in Baltimore.

Q. She understood the German language? A. Oh, yes; perfectly.

Q. Did you talk with her in German? A. Yes, sir; that was the request that was put to me, that I should offer a prayer in the German language.

Q. And you went there four or five times after that, from the 6th of July up to the time of her death? A. Yes, sir; about four or five times I went there.

Q. At intervals of about how many days would you go there? A. Say about a little over two weeks.

Q. You went there about the 6th of July, you say, and then you saw her four or five times afterwards? A. Yes, sir.

96 Q. Of course you did not see her every day? A. No, sir.

Q. How many days would elapse between your visits? A. About two or three days.

Q. And then you would go again? A. Yes, sir.

Q. At any time that you were there did you observe that Mary Beyer was unconscious or did not understand? A. No, sir.

Q. She always understood what you said? A. She always appeared to me conscious.

Q. And you talked to her and there was another minister there, was there not? —. Yes; the last time I was there—that was in the beginning, the first two days of the last week before her death. You see, I could not go afterward. I found another minister there. I do not know whether he was the regular minister. It was told to me that he was an Adventist. He offered a prayer, and I understood that she before visited his services, or something like that, and dur-

ing the week I had important business at Frederick, Maryland, and I was several days absent from the city. I went away on Thursday and stayed until Saturday evening, so as to be ready on Sunday morning for service, and in the afternoon I understood that Mrs. Beyer had died, and I stopped at the house.

Q. When this minister was there, whoever he was, he conversed with her, did he not? A. I did not hear him converse with her.

Redirect examination.

By Mr. POE:

97 Q. Did you ever converse with her? A. No; I did not converse with her—not on that day. When I left she always told me to call again. You see, you could not have any conversation because her sickness was very serious. In fact, it would not have been advisable to converse with her.

By Mr. MACKEY:

Q. Of course, you did not have any sustained conversation with her, but you did ask her a few questions, how she was, &c.? A. Oh, yes; I did that when I first met her—asked her how she felt and how she was, and her answer was that she was very sick.

Q. Her answers were intelligent? A. Oh, yes; she seemed to me conscious. She understood me perfectly.

By Mr. RIDOUT:

Q. Do you remember who it was who suggested that you should pray in German? Was that Mrs. Beyer? A. It was one of her nephews, I think, at my house. He asked me—he said that his aunt——

Mr. POE: We object to that.

The COURT: He was going to detail what the aunt said. I do not see that that *it* is material. It does not seem to me competent.

Mr. RIDOUT: Let the record stand as it is about that. (To the witness:) How frequently did you pray with Mary Beyer in German? A. I think about three times. I said the fourth time I did

98 not offer prayer; some of the other gentlemen prayed there. Q. And professional etiquette required that you should withdraw? A. I offered prayer every time I went there except the last time, when I found the other man.

Q. And when you did offer prayer, you offered it in German? A. Yes, sir; because it was her request.

Mr. POE: "That it was at her expense." We want that struck out.

The COURT: That was the witness' inference. I did not understand that the Doctor said that she asked him.

By Mr. MACKEY:

Q. Did she ever ask you to pray in German? A. Oh, yes; she

asked me to pray in German. I knew that she understood the English language perfectly, because she was a native of Baltimore. I asked her the first time whether I should pray in German and she said yes.

PATRICK J. BRENNAN, a witness on behalf of the caveators, having been first duly sworn, testified as follows:

Mr. POE: Your honor, this is one of the attesting witnesses to the will. Of course, I do not propose to be bound by his testimony. The rule, I think, is perfectly plain that I would have the right, even, to contradict him, if I chose to. I merely want to elicit from him the fact that the will was signed.

Mr. RIDOUT: Mr. Poe has admitted the *factum* of the will, and he does not need to call Mr. Brennan. I give him notice that he shall be bound by Mr. Brennan's testimony.

99 The COURT: I do not think you are called upon to prove the fact. You admit that the will was signed.

Mr. POE: Yes.

Mr. MACKEY: We assert that it was.

The COURT: You are at liberty to examine the witness about the circumstances.

Mr. RIDOUT: Yes; and I understand that he is bound by Mr. Brennan's testimony.

The COURT: We all understand what the rule is. I do not think you are bound by the testimony of the witnesses in this or any other case. You are at liberty to show that the witness is mistaken and all that. The distinct rule is that you cannot put any question looking to a contradiction of the witness.

Mr. POE: With the understanding that the cross-examination shall be restricted to matter brought out in the examination-in-chief I will ask a few questions.

The COURT: We always do that according to the rule of the supreme court.

Mr. RIDOUT: You understand, Mr. Poe, that we claim our rights?

By Mr. POE:

Q. What is your name? A. Patrick J. Brennan.

Q. And your occupation? A. Vice-president of the Cranford Paving Co.

Q. Are you a member of this bar? A. I am.

Q. How long have you been a practitioner here? A. I never practiced before the courts; simply became a member of the bar after examination.

100 Q. Where is your office? A. 1418 F street N. W.

Q. Where was it in July, 1896? A. The same place.

Q. Do you know where Louis Beyer, Jr.'s, office was then? A. Yes, sir.

Q. Where was it? A. 1418 F street N. W.

Q. The same building with you? A. Yes, sir; same building.

Q. In the same room? A. No, sir.
Q. Adjoining room? A. No, sir.
Q. Near to you, was it? A. The floor below.
Q. When did you become acquainted with Mrs. Beyer, the deceased lady? A. It was in July; about the time of the date of that will.
Q. Did you prepare this will? A. I did.
Q. Who asked you to go to see this lady? A. Mr. Beyer.
Q. Which Mr. Beyer? A. Mr. Louis Beyer.
Q. Junior? A. Yes, sir.
Q. You were present at its execution? A. Yes, sir.
101 Q. What became of it after it was executed? A. I took it to my office.
Q. To whom did you give it after that? A. After the death of Mrs. Beyer I gave it to Mr. Louis Beyer, Jr., and Mrs. Johnson.
Q. How many times did you see Mrs. Beyer before she executed this will? A. Never saw her before—that is, before she executed that will. I saw her twice.
Q. Whereabouts? A. At her house.
Q. Who was present? A. Dr. Smith and Mr. Sullivan on one occasion, and on two other occasions there was Dr. Smith, Dr. Atkinson, and I.
Q. Who is Mr. Sullivan? A. He is an attesting witness to the first paper that was signed.
Q. There were two papers signed? A. Yes.
Q. What became of the first paper? A. The first paper was burned.
Q. In your presence? A. I burned it myself.
Q. Whereabouts? A. I think it was at the residence of Mrs. Beyer.
Q. What day was that? A. That was on the Tuesday following the Sunday that the first draft of the will was drawn up.
Q. There were two wills executed by this old lady in July, were there? A. Yes; two wills executed.
102 Q. Were you a witness to both of them? A. Yes, sir.
Q. Dr. Smith was a witness also to both of them, was he? A. Yes, sir.
Q. Mr. Sullivan was the third witness to the first one? A. Yes, sir.
Q. And Dr. Atkinson was the third witness to the second one? A. Yes, sir.
Q. You say you are not a practicing lawyer now? A. No, sir.
Q. And you were not a practicing lawyer then? A. No, sir. I have a sign up. I attended to the local business of the company with which I am associated to some extent.
Q. Is Louis Beyer, Jr., associated with you in business? A. No, sir.
Q. How did Dr. Atkinson happen to come out and witness this paper? A. He is a friend of mine.
Q. You asked him to come out? A. Yes, sir.

Q. How did Dr. Smith happen to be a witness? A. I do not know. He was the attending physician, as I understand it.

Q. So this old lady made two wills in three days in July, did she? A. I do not know whether you call the first one a will or not. I discovered an error in the language I used, and I went out and corrected it and rewrote it.

103 Did you not put it in an envelope after the first one was executed and after you took it away? A. The first one?

Q. Yes. A. I do not think I had an envelope in the house; no.

Q. You read it over and found it was a mistake? A. Yes, sir.

Q. How did you know it was a mistake in her will? A. I simply had omitted the word heirs in making the fee.

Q. Was it not that somebody told you that it was invalid—a will made on Sunday? A. Hardly.

Q. Answer the question. That was not the reason? A. No, sir.

Q. Where was this old lady when she signed this first will? A. She was in bed.

Q. Where when she signed the second one? A. She was in bed.

Q. Did you have any conversation with her? A. Yes, sir.

Q. State what that conversation was on this occasion? A. On which occasion?

Q. When this will in controversy was executed—what was your conversation with her then? A. I read it over to her as prepared. If that is the paper, I read it over to her. I read the will over to her.

Q. What did she say? A. I asked her if that was her will,

104 if it was correct as she had instructed, and she said it was all right.

Q. Did she say it loud or low? A. Said it in an ordinary tone.

Q. Ordinary tone of voice? A. Yes, sir.

Q. Ordinary for her, or ordinary for other people? A. That I do not know. I suppose it would be an ordinary tone.

Q. You saw her twice? A. I saw her three times.

Q. Did she know the difference between the will that had the word heirs omitted and the one that had it in it? A. Yes, sir; I told her the reason, and explained that we would have to make a new paper.

Q. Did she assent to that, or say yes? Give us her language. A. There were different directions given after the submission of the second paper to her.

Q. I am asking you for the conversation with her. A. She directed that I make some changes in it, in the second paper as prepared with the corrections indicated by me at first—that is, the insertion of the word "heirs" Then she directed me to make other changes in the will.

Q. Did you make them? A. Yes, sir.

Q. Did you have your typewriter with you? A. No, sir; I took the paper back to my office and dictated it.

Q. I am asking for the conversation that took place on Tuesday,

and you are manifestly stating a conversation that took place
105 on Monday. I am asking for the conversation that took place at the time the will was executed? A. I read the will over to her, and Mrs. Beyer said that was all right as I had it written; said that was her will, and Dr. Smith and Dr. Atkinson were in the room when I read it over to her.

Q. Did they hear you read it? A. Yes, sir; I am positive of that.

Q. Did they say it was all right?

Mr. RIDOUT: This is the gentleman's own witness.

Mr. POE: I do not think he is my witness.

Mr. RIDOUT: I withdraw my objection.

The WITNESS: No, sir.

By Mr. POE:

Q. You say you saw this lady on three occasions? A. Yes, sir.

Q. Did you ever see her alone? A. Yes, sir.

Q. When was that? A. That was on the first occasion.

Q. Where was she then? A. She was in bed.

Q. What was that date? A. It was on Sunday.

Q. That was the day the will was executed? A. That was the day the first will was executed; yes, sir.

Q. When you got your instructions from her who were present? A. There was nobody present. Dr. Smith was in the next room.

106 Q. You saw her alone on two occasions then? A. I think Dr. Smith was in the room the second time; yes, sir.

Q. Did you go out there by yourself the first time you went there? A. The first time I went there; yes, sir.

Q. You got the address from Mr. Louis Beyer, Jr., I suppose? A. Yes, sir.

Q. How was the first will written; in her presence or not? A. Yes, sir.

Q. Wrote it right from her dictation? A. Yes, sir.

Q. She dictated it to you, did she? A. Practically so; yes, sir. She told me just what she wanted—what she wanted done with her property.

Q. The witnesses were all there at that same time, were they? A. In the room at that time, no, sir.

Q. No; I mean in the house at that time? A. Yes, sir; they were in the house.

Cross-examination.

By Mr. RIDOUT:

Q. When did you first become acquainted with Mr. Louis Beyer, Jr.? A. I suppose about 15 years ago.

Q. How long has your office been at 1418 F street? A. It has been, I understand, for about 27 or 28 years. I said the office of the Cranford Paving Co.

Q. How long have you occupied that office? A. Since 1884. I was with Mr. Cranford as clerk in 1884.

107 Q. On the occasion of your going to Mrs. Beyer's house, what did Mr. Louis Beyer, Jr., say to you which led to your going to the house?

Mr. Poe: I object to that.

Mr. Ridout: This is cross-examination. There has been an attempt to intimate that there was some understanding between young Beyer and this witness.

The Court: I do not see that there is any ground for that hearsay testimony.

Mr. Ridout: I do not think it would be hearsay.

The Court: Why not?

Mr. Ridout: Because it would be as to the fact. Mr. Poe has asked about the intimacy between these two gentlemen—whether they were intimate in business. We want to show that there was no understanding or relation between these two gentlemen such as his questions intimate. Therefore we wish to give the jury precisely what occurred between these two men.

The Court: I do not think that there is any inference to be drawn that counsel supposed that there was any conspiracy between this witness and young Beyer.

Mr. Ridout: I am willing to leave the question there. I tender myself ready to have all that occurred there.

The Court: I do not think it competent to prove by this witness or any other witness declarations against Mr. Beyer.

(By Mr. Ridout:)

Q. About what time in the day did you arrive at Mrs. Beyer's?

The Court: You mean the first time he went there?

Mr. Ridout: I am talking of the first time; yes.

The Witness: In the neighborhood of three or four o'clock,

108 I do not recollect exactly—some time in the afternoon.

By Mr. Poe:

Q. Did you go alone from your house to her house? A. Yes, sir.

Q. When you arrived there, what did you say to her when you first entered the room? A. I said, "Mrs. Beyer, I understood that you want to make a will."

Q. What did she say? A. She said, "Yes." She said, "Are you the lawyer?" I said, "Yes, ma'am."

Q. Do you remember what the next question she asked was? A. No, sir; I do not. She asked somebody to get a pen and ink and some paper.

Q. And that was done, was it? A. Yes, sir.

Q. Did she proceed? How did you get at her wishes? By asking her questions, or did she proceed to tell you? A. She proceeded to tell me just how she wanted everything left.

Q. Can you from memory state what she said on that subject—what her disposition was? A. There is one thing that I remember very distinctly. She said that she did not want to leave her husband, Mr. Louis Beyer, Sr., the property, because she said that he had already squandered about $30,000 of the money she had made in patents and inventions and all that, and said that she was afraid that if she left the property to him for life even, they might probably do something with it—entangle it to further his inventions that he was supposed to be carrying on at that time—that is,
109 experiments.

Q. Did she say what she wanted to do, so far as she was concerned? A. Yes, sir; I think that is clearly set forth. I tried to make it as clear as I could in the will.

Q. What did she say she wanted to do, so far as she was concerned? A. She said that she knew—that is, she hoped that Mrs. Johnson and Louis and Mr. Beyer would live in the house as long as Mr. Beyer lived. She said she did not want, in the event of a favorable condition presenting itself for a sale, any restriction on it in the way of giving it to Mr. Beyer for life.

Q. How did you ascertain, if you did ascertain, that Mr. Louis Beyer, Jr., was originally named Charles Louis Smith, and that he was Mrs. Mary Beyer's adopted son? A. Mrs. Beyer told me when I went in the room that Sunday afternoon.

Q. How did you obtain the names of the two sisters of Mrs. Beyer? A. Mrs. Beyer told me the names.

Q. How did you ascertain the spelling of those names which you doubtless remember as peculiar? A. I read them out to her and spelled them over, and asked her if that was the way, and, I think, in one or two instances she made corrections in the spelling that I had originally—that is, when she called out the name I would spell it phonetically, and she would probably change it one way or the other.

Q. How did you learn the amount of the legacy to be left
110 to these three persons? A. From Mrs. Beyer.

Q. Did she give any reason for giving the legacy? A. No, sir.

Q. In the first paper which you say was written and executed on Sunday, to whom was the residue of the estate given? A. The residue of the estate was given to Louis Beyer, Jr.

Q. When you had that instruction, was anything said by Mrs. Beyer about Mrs. Johnson? A. Yes, sir.

Q. What was it? A. She said she knew and would instruct Louis to give half of it to Mrs. Johnson.

Q. You have said that after the will was prepared you took it away? A. Yes, sir.

Q. And upon examination you discovered what you discovered to be an omission in it? A. Yes, sir.

Q. Explain to the jury a little more fully what that omission was as you supposed it to be. A. The intention of Mrs. Beyer was to leave the property absolutely to Louis Beyer, Jr., and in some cases

the omission of the word "heirs" bequeathed property only for life, whereas by the insertion of the word "heirs" it would leave it absolutely to him and his heirs, or he could dispose of it as he saw fit—left it to him absolutely.

Q. How did you ascertain, in preparing this first paper,
111 who was to be the executor? A. Mrs. Beyer told me.

Q. What, if anything, did she say about his giving bond? A. I asked if she wanted him to give bond and she said, No.

Q. What difficulty, if any, did you have in understanding what Mrs. Beyer said, by reason of her being unable to talk? A. None whatever; spoke very clearly.

Q. Do you recollect whether in your conference with her she made any inquiry concerning the validity of a will made on Sunday? A. Yes, sir.

Q. What did she ask you? A. That was probably the first question that was asked me—a few minutes after I went into the room—whether a will made on Sunday was good.

Q. And you told her it was? A. Yes, sir.

Q. What transpired at the execution of the will? After you prepared it did you read it to her? A. Yes, sir; read it all.

Q. Where were the gentlemen who witnessed it—Mr. Sullivan and Dr. Smith? Were they in the house? A. Yes, sir; in an adjoining room.

Q. Did you call them in? A. I called them in in the first instance, after I read the will over to Mrs. Beyer.

Q. What did you ask her in their presence? A. After the witnesses were called in?

Q. Yes. A. I stated that I had just prepared the will of Mrs. Beyer. I had read it over to her. I asked her if it was her
112 last will and testament, and asked her if she requested us to attest it as being her last will, and request the gentlemen to sign it as witnesses, which she did.

Q. In your conference with her, what difficulty did you have in making her understand what you said to her? A. None—no difficulty at all.

Q. What was done with that paper after it was signed by her and witnessed—I mean the first paper? A. I took it to my office and read it over the next morning.

Q. And it was then you discovered the omission of the word heirs? A. Yes, sir.

Q. What did you do with relation to preparing another paper? A. I prepared another paper with that insertion in it and took it to Mrs. Beyer's house the next day.

Q. That was the following Monday? A. Yes, sir.

Q. What did you tell her? A. I told her that I had made an omission in the phraseology of an important part of the paper—the omission of the word heirs, which might create a life estate instead of an estate in fee-simple, which I had corrected, and said that it was the same paper. I read it over to her.

Q. What did she say? A. She said, Inasmuch as the will has to

be rewritten, you might as well leave the property to Louis Beyer, her son, and Helen B. Johnson—put Helen Johnson in the will.

Q. In that copy the name of Helen Johnson did not ap-
113 pear? A. No, sir.

Q. What did you then do? A. Took the will back to my office and rewrote it according to her direction and returned there on Tuesday.

Q. Inserting Mrs. Johnson's name? A. Yes, sir.

Q. What difference was there between the first paper and the second paper? A. There is no difference except Mrs. Johnson and Louis Beyer, Jr., were left the residuary estate instead of its being left to Louis Beyer, Jr. All the other conditions were the same.

Q. In speaking of the second paper I speak of the paper which was finally executed after the paper which you took on Monday. A. There was no difference in that paper except the insertion of the word heirs.

Q. You have already told us the difference in the paper of Monday and the paper of Tuesday, namely, that Mrs. Johnson—— A. She was given an equal share.

Q. You went there on Tuesday? A. Yes, sir.

Q. What transpired on that occasion? A. I read the paper over to her as it was rewritten and had Dr. Atkinson and Dr. Smith—they were in the room—read the paper over to her, and asked her if that was her last will and testament; asked her if she acknowledged it to be such, and asked her if she requested us to sign it as her last will and testament. She requested the gentlemen to sign it as her last will.

114 Q. Did she sign in their presence? A. Yes, sir.

Q. And did they sign in her presence and in the presence of each other? A. Yes, sir.

Q. At the time when this paper was signed, this final paper, was Mrs. Beyer, in your opinion, of sound mind and capable of executing a valid deed or contract? A. She was.

Q. Please look at the paper I hand you (handing witness the will) and state whether that is the paper finally executed by Mrs. Beyer. A. Yes, sir; that is the paper.

Q. Is that your signature, P. J. Brennan? A. Yes, sir.

Q. And on the front of it also? A. Yes, sir.

Q. During the first visit and when you were obtaining instructions as to this will who were present—anybody besides you and Mrs. Beyer? A. As I remember, Dr. Smith was sitting in the adjoining room. There is a window that opens between the two rooms.

Q. Was either Louis Beyer, Jr., or Mrs. Johnson there? A. No, sir. There was one time that Mrs. Beyer called for a drink of water. I forget whether she called Mrs. Johnson or Louis and had them bring her a drink of water, and he did so and gave it to her.

Q. Did he remain after he gave her the water? A. Dr. Smith?

115 Q. No; Louis? A. No, sir. I do not remember whether he came into the room. I think he handed the water to Dr. Smith.

Q. Who was present on the second occasion when you had your conversation with Mrs. Beyer? A. Nobody except Dr. Smith.

Q. Did either Mr. Louis Beyer, Jr., or Mrs. Johnson at any time give you any instructions or directions concerning the contents of either of these papers? A. No, sir.

Q. Did you ever have any consultation with either of them about it? A. No, sir.

Q. From whom did you derive the information from which you prepared these wills? A. From Mrs. Beyer—that is, the lady who signed the will.

By Mr. MACKEY:

Q. The testatrix? A. The testatrix.

Q. After the last paper was signed, the one which you have identified, what was done with it? A. I took it to my office, put it in an envelope, sealed it up, marked what it was, and put it in my safe at the office.

Q. Did it remain there until after the death of Mrs. Beyer? A. Yes, sir.

Q. Then what was done with it? A. I took it down to Mr. Beyer, Jr.

Q. You knew from having prepared the paper that Mr.
116 Beyer, Jr., was named as executor, did you not? A. Yes, sir.

Q. And you knew, as a lawyer, the first duty of an executor was to prove the will?

Mr. POE: I object to that. What he did is evidence, but not what he knew.

The COURT: How would that have any effect on the case?

Mr. RIDOUT: The same reason that I made——

The COURT: It may go in.

The WITNESS: Yes, sir.

By Mr. MACKEY:

Q. And that is the reason you gave it to him? A. Yes, sir.

Redirect examination.

By Mr. POE:

Q. Might you not be mistaken about that—where you took it? A. I beg pardon.

Q. Might you not be mistaken about your having taken it to Mr. Louis Beyer, Jr.? A. No, sir.

Q. Suppose you were told that you made an affidavit, that it remained in your custody until you took it to the register of wills, would that have any effect on your answer?

Mr. RIDOUT: We object to that.

(By Mr. POE:)

Q. When you got out there on this occasion for the purpose of

having this will executed (which had been drawn) the witnesses were there, were they not? A. Mr. Sullivan was there. I do not think Mr. Smith was there.

117 Q. Who took Dr. Atkinson out there? A. As I remember, I went to his house.

Q. Did you take him out with you or you go in his buggy? A. I forget whether I took him out in my buggy or he took me in his.

Q. You went together? A. Yes, sir. I forget whether I took him in my own buggy or he followed me up.

By Mr. MACKEY:

Q. Did you arrange with the witness yourself, Dr. Atkinson, to take him out? A. Yes, sir.

Q. Did anybody suggest Dr. Atkinson to you? A. No, sir.

Q. Did anybody suggest that Dr. Smith should be a witness? A. No, sir.

By Mr. POE:

Q. Did you see Louis Beyer, Sr., on any of these occasions? A. No, sir. I would not know him even if I saw him.

WADE HAMPTON ATKINSON, a witness on behalf of the caveatees, having been first duly sworn, testified as follows:

By Mr. RIDOUT:

Q. You are a practicing physician? A. Yes, sir.

118 Q. How long have you been such? A. About nine years.

Q. Do you remember the occasion of your going to Mrs. Beyer's house to witness a paper? A. Yes, sir.

Q. Do you remember when it was? A. I do not remember exactly when it was. I will have to refer back to the memorandum book of that date.

Q. Approximately? A. It has been about three years ago—two or three years ago. It was in the summer.

Q. Do you remember why you went? A. I went at the request of Mr. Brennan to witness the signature of a lady to a will.

Q. When you arrived there what transpired? A. I was there on two occasions. The first occasion when I was there, there was to be an alteration or change in the paper. That was not ready to sign. Then another day after that I went. I do not remember whether it was the next day.

Q. What transpired on the last occasion? A. The last occasion I was there I met Dr. Smith. I met Dr. Smith on both occasions. We went into the room. I was introduced to the lady. Dr. Smith and I were in the room at the window, or in the room while Mr. Brennan read the will to the lady. Then we were called to witness her signature, which she signed right there in our presence.

Q. You saw her sign? A. Yes, sir.

Q. You signed in her presence? A. Yes, sir.

Q. And in the presence of the other two witnesses? A. Yes, sir.

119 Q. You had an opportunity to observe Mrs. Beyer. Please tell us whether, in your opinion, she was at that time of sound mind and capable of executing a valid deed or contract. A. She seemed to be a bright and intelligent lady. I observed nothing unusual. Of course, she was a lady in bed; had been sick; but otherwise she appeared in mind perfectly clear—perfectly conscious of what she was doing,

Q. Had you any acquaintance with Mr. Louis Beyer, Jr., or Mrs. Johnson? A. I did not know them at all.

Q. Were you requested by them or any one for them to witness this paper? A. No, sir; requested by no one but Mr. Brennan. Mr. Brennan asked me if I could go out and witness a signature to a will, and I told him I would.

Cross-examination.

By Mr. Poe:

Q. How long on these two occasions did you see this old lady? A. On the first occasion I did not see her at all.

Q. On the second occasion how long did you see her? A. I must have been in the room a half hour or more.

Q. How many conversations have you had on this case since the last of September and with whom? A. You were the first one I had any conversation with.

Q. How many with others? A. I do not know that I have had — with any one else. I spoke to Mr. Brennan that I understood there was a case where I signed the will.

Q. Did you not have a conversation with Mr. Brennan
120 about it? A. Nothing more than to ask about the dates.

Q. What other conversation do you remember about? Your mind seems a little fresh. A. Yes, sir. I heard a good deal more in the court.

Q. Do you not remember a conversation that you had with me last September, in which you said you did not know whether Mrs. Beyer was sitting up in the bed or in a chair? A. No, sir. I said she was sitting up in the bed.

Q. Do you not remember saying you did not know whether she was in a chair? A. It was three years ago, and remembering the number of people I have seen in the three years it is almost impossible for me to recall the circumstance; but before you left I think I told you, as nearly as I remember, that I thought she was sitting up in bed.

Q. Did you not tell me on that occasion that you did not remember whether the will was read to her? A. I told you on the first occasion that the will was read to her before she signed it, and in bringing the subject up and placing the circumstance I do remember distinctly that the will was read, and what part of the room it was in.

Q. It is further away now than it was then from the 14th of July, 1896. How is it your memory is better now than it was then? A.

That is very easy if you will remember that I never heard any word about that will or signature, or anything else, until the day you called my attention to it.

Q. And up to that time it was the only will that you had ever witnessed? A. No. I have witnessed one since that.

121 Q. I mean up to that time? A. That was one of my first wills.

Q. That was the first will you had ever witnessed? A. Yes, sir.

Q. You say that this old lady was sitting up in bed? A. Yes, sir; she sat up in bed.

Q. She was propped up? A. Probably a pillow to her back—something like that.

Q. How was her voice? A. Clear enough to be understood.

Q. How long were you there on that occasion? A. I do not remember exactly; but I must have been there a half hour. I do not remember exactly how long it was.

Q. How long have you known Mr. Brennan? A. I have known Mr. Brennan ten or twelve years.

Q. It was at his request that you went out there to witness this paper? A. Yes, sir.

Q. Did he call to you or did you call for him? A. Mr. Brennan, I think, came by my office and asked me if I could go at a time that would suit Dr. Smith's convenience. I was not so very busy and I told him that I could. I think that Mr. Brennan drove by with his horse, and I drove right on afterward. I had somewhere to go afterward.

Q. How long were you there on this occasion? A. Somewhere about a half hour.

Q. Were you in this room all the time? A. No. I do not know that I was in the room all the time; but in the hall and back room.

122 Q. How long were you in that lady's presence? A. I was in her presence twenty minutes or thereabouts.

Q. You have sworn that she was of sound and disposing mind and capable of making a valid deed or contract. Is your opinion based on these two interviews with her or have you any other means of judgment? A. That is all I know.

Q. That is all you know about it? A. Yes, sir.

Q. You did not witness two papers; you did not see her only on this one occasion? A. I only witnessed one paper.

The court (at 3 o'clock p. m.) adjourned until tomorrow, the 7th inst., at 10 o'clock a. m.

WASHINGTON, D. C., *December* 7, 1899.

The court met pursuant to adjournment.

Present: Mr. Poe and Mr. Wallace, on behalf of the caveators; Mr. Ridout and Mr. Mackey, on behalf of the caveatees.

Mr. POE: We desire to offer in evidence a deed from Helen B. Johnson and her husband and Louis Beyer, Jr., to Louis Beyer, Sr., of a portion of the property of Mary Beyer.

The COURT: This is the deed of which you spoke on yesterday.

Mr. POE: Yes. This deed was executed on the 31st day of July, 1896, about four days after the death of the testatrix, and according to the evidence about two days after the fact of the existence of a will had been furnished by the husband.

123

The COURT: I do not hear any objection.

Mr. RIDOUT: I reserve my exception as stated on yesterday.

The COURT: As I understand, your only objection is that it is irrelevant; throws no light upon the case?

Mr. RIDOUT: Yes.

The COURT: I think while it may not be very important it may be of some consequence.

Mr. RIDOUT: We reserve an exception.

The COURT. Certainly.

Mr. POE: The deed is in Record Book 203, at folio 372.

We also offer in evidence, unless my brothers will agree to the fact—the papers I cannot find, but the minutes of the court show that it was on the 20th of August, 1896, that Charles Louis Smith, who is called Louis Beyer, Jr., applied to this court to have his name changed to Louis Beyer, Jr., that being a month after the date of the will itself and a few days prior to its being offered for probate by him. I suppose there is no objection to that; that is the fact.

Mr. RIDOUT: If the court think that relevant I have no objection.

The COURT: Yes.

Mr. MACKEY: Of course, it could not affect Mr. Beyer in this matter at all what he did after the making of the will.

The COURT: I do not know that it could.

Mr. POE: We will rest here except for the purposes of rebuttal.

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ERNEST AUGUSTUS SELHAUSEN, a witness on behalf of the caveatees, having been first duly sworn, testified as follows:

By Mr. MACKEY:

Q. You are a practicing physician in Washington, I believe? A. Yes, sir.

Q. How long have you been practicing your profession? A. Twenty years.

Q. Were you acquainted with Mrs. Beyer, deceased? A. I only saw her once in my life.

Q. State the occasion on which you saw her—how you came to see her. A. Having a consultation over her case with Dr. Smith.

Q. You were summoned there for a consultation? A. Yes, sir.

Q. About when was that—how long before her death? A. That was within two weeks of her death.

Q. You went out there, did you? A. Yes, sir.

Q. Whom did you see there? A. I wanted to meet the Doctor and I could not meet him. I went the next day with the expectation of meeting him, the same hour, and I did not meet him, but I saw the patient.

Q. Did you make an examination? A. Yes, sir.
Q. What did you find was the matter? A. I found that she was suffering from carcinoma colloid.
125 Q. State what was the state of her mind; whether she was unconscious.

Mr. POE: We object to that. We do not think this witness has laid any foundation to speak as to the mental capacity of the testatrix.

The COURT: Suppose you see how much the witness talked with Mrs. Beyer.

(By Mr. MACKEY:)

Q. Did you talk with her—ask her questions? A. Yes, sir.
Q. From your conversation with her, state whether or not she——

Mr. POE: We object.

(By Mr. MACKEY:)

Q. Did she make any explanation to you of the occasion for your coming there? A. Yes, sir.
Q. State what she said. A. She knew that I was coming to consult with Dr. Smith.
Q. As a result of your conversation with her, will you state what her condition of mind was; whether she was intelligent——

Mr. POE: We object.

By the COURT:

Q. How long did you talk with her? A. About 20 minutes.
Q. What questions did you ask her? A. Concerning her case—how long she had been sick.
Q. What did she say to you on the subject? A. I cannot say exactly what she said.
126 Q. Can you not remember generally what she said? A. It was all about her case. When I asked her some questions she answered quite sensibly. I did not find anything abnormal about her mind.

The COURT: What is the objection to the witness giving his opinion based on what he has stated?

Mr. POE: We do not think a witness of this character has to answer whether at this time this person was of sound and disposing mind——

The COURT: It is the form of the question.

After discussion:

The COURT: We agree upon the law. The only place where there is any chance of controversy is that you think the court should require more to satisfy it, while the court is satisfied the witness may give an opinion. My impression is that the authorities at the present day go very far. There are some and well-considered cases that go so far as to say that the court ought not to exclude the opinion, if any reasonable opportunity has been afforded for the

person to form an opinion. In a case of that kind, now, much depends upon the intelligence of the witness, to begin with. There are some witnesses whom I would not permit to give an opinion—who had so little chance to form an opinion. This is an intelligent witness. He is a non-expert, but he is an intelligent man, and had a chance to talk with the will people and all that, and it seems to me that a sufficient foundation has been laid to permit him to give his opinion. Of course, the jury takes it in connection with the opportunity that he had to form an opinion, and they will give his opinion such weight as they think it is entitled to. I express no opinion as to the weight. They may think it very weighty. We think it worth nothing at all, or very little, and that is for them. I think it is admissible.

127 Exception noted.

(By Mr. MACKEY:)

Q. State from your conversations with Mary Beyer whether in your opinion she was of sound mind and understanding and capable of executing a valid deed or contract at the time. A. I think she was of sound mind and capable.

Q. Of executing a valid deed or contract? A. Yes, sir.

Cross-examination.

By Mr. POE:

Q. You were summoned here on behalf of the defendants? A. Well, I do not know by whom; I do not know whether by the defendants or whom.

Q. Who was present when you had this 20-minutes interview with this lady? A. There were two ladies present.

Q. You did not wait to keep your consultation appointment with Dr. Smith? A. No. I waited about 20 minutes and he did not come. He wanted me to come the day before, but I did not meet him that day, and I went the next day at the same hour and he did not come.

Q. When was the last time you saw Dr. Smith? A. I cannot say the exact date. It must have been the 15th or 16th. I do not know exactly.

Q. How long ago was it that you saw him last, speaking from now? A. I saw him this morning.

Q. How long before you were summoned as a witness did
128 you see him? A. In this case?

Q. Yes. A. Yesterday.

Q. Did you have any talk with him about this case? A. No, sir; just——

Q. No talk about the case? A. Just speaking about the case—not what was the matter with him or anything like that.

Q. You had some talk with him about the case? A. No.

Q. Did he ask you how you happened to be in the court and he happened to be in the court? A. Yes, sir.

Q. Well, you did get to talking about the case, did you not? A. Not exactly.

Q. Did he ask you if you were a witness? A. He asked this morning if I was summoned by the defendant- or the plaintiff.

Q. Have you ever been paid for the visit that you made to this old lady? A. No; indeed, I do not know whether I have been paid or not.

Q. You do not know? A. No.

Q. You have never filed any bill against the estate, have you? A. I do not think they owe me money, because I did not keep my date.

129 Q. You have not been paid for your services? A. No, sir—that is, I do not know whether I have been paid or not. I do not remember.

Q. Do you know what the charge was that you made against them? A. No; I do not remember what I charged or whether I made any charge or not.

Q. Are you a specialist in cancer diseases? A. I am a specialist in everything—I am a general practitioner.

Q. You are an all-around expert, are you? A. Yes, sir.

Q. Did you examine this lady with reference to her capacity to make a valid will or contract? A. I did not know anything about it.

Q. You examined her merely for her physical ailments, and you were there 20 minutes? A. Twenty minutes; yes, sir.

Q. You do not know that you were there 20 minutes? A. I think it takes about 20 minutes to examine a case, at least.

Q. Where was this lady? A. On Brightwood avenue.

Q. What part of the house? A. In the second story. I believe it was the front room.

Q. Was she in bed? A. Yes, sir.

Q. You say it was the 5th of July? A. No; it must have been the 15th or 16th—the middle of the month.

Q. You made an inspection as well as an examination of
130 her to see what was the matter with her. Was she in much pain? A. None at the time.

Q. Did you suggest any mode of treatment to her? A. No; I do not believe I did, because I did not have any right to make any suggestion.

Q. You did not prescribe for her, even, did you? A. No, sir.

Q. Was her disease, in your judgment, progressive and incurable at that time? A. Yes, sir.

THOMAS C. SMITH, a witness on behalf of the caveatees, having been first duly sworn, testified as follows:

By Mr. RIDOUT:

Q. State your name and professional business. A. Thomas C. Smith; my profession is that of physician; my residence is 1133 12th street N. W.

Q. You knew the late Mrs. Beyer? A. Very well.

Q. How long did you know her? A. I knew her several years—probably three or four years before her death.

Q. What occasion was there for your acquaintance with her? A. I was called in to attend her professionally.

Q. How long was that before her death? A. When I was first called to see her, if I recollect aright, it was in December, 1893. She was suffering from symptoms of an ordinary case of indigestion.

131 Q. She died in July, 1896? A. July, 1896.

Q. How frequently were you a visitor at her house after that? A. I was called in many times to attend her for temporary ailments, and then discontinued my visits to return to the house when sent for by the family. Sometimes I would attend her three or four days at a time, and then maybe pay her one or two visits sometimes for a week at a time.

Q. How well acquainted were you with her? A. I became pretty well acquainted with her, being called to see her so often, and then many times called to see other members of the family I would see her.

Q. Do you remember when the illness of which she died commenced—when it first developed? A. I cannot fix the date of that, but probably earlier in the year 1896. The symptoms of malignant disease were so pronounced as to be unmistakable. Before that the symptoms pertained more to disease of the liver of a chronic character without pointing to malignity.

Q. What did you finally diagnose the disease to be? A. The case diagnosed as one of cancer.

Q. Of what part of the body—where? A. Within the abdomen. I do not know that it is necessary for me to state to the jury that it was revealed cancer.

Mr. POE: No; she died of cancer; there is no doubt about that.

By Mr. RIDOUT:

Q. What effect on the brain power is produced by a disease of that character as to diminishing its force? A. Do you mean as to her intelligence?

132 Q. Yes. A. I never saw any evidence to impress me with the belief that she was not perfectly sane.

Q. What we want to know is whether there was anything in the nature of this particular disease, the effect of which would be to impair the efficiency of the brain. A. Not at all; not until within a few days of her death.

Q. Do you recall at any time any allusions by Mrs. Beyer, in conversation with you, to her purpose to make a will? A. No, sir.

Q. Do you remember whether you ever had any discussion with her on the subject of her will? A. Not a word.

Q. Do you recall the Sunday on which Mr. Brennan was at the house? A. To witness the will?

Q. Yes. A. Yes.

Q. Do you remember why you were there on that occasion; why

you were at the house on Sunday? A. I intended to make a professional call, and was also requested to witness the signing of the will.

Q. When were you requested? A. The day before.

Q. And who requested you? A. I do not remember; some member of the family; perhaps Mrs. Johnson.

Q. When did you arrive at the house on that Sunday? A. I cannot fix the hour, but my impression is about the middle of the day.

133 Q. Had Mr. Brennan arrived when you reached there? A. Mr. Brennan arrived, I think, shortly after I did. We met by appointment at a certain hour.

Q. State, as nearly as you can recollect, what transpired after you arrived there and after Mr. Brennan arrived. A. Mr. Brennan produced a paper, which he proceeded to read.

Q. I am talking now about Sunday. I am asking you what occurred on Sunday, the first day that you were there. A. The first day that this——

Q. When he first paper was signed. A. I am not sure whether it was on Sunday. I do not recollect for certain when I went into the room. When Mr. Brennan came, he proceeded to read a paper which he had prepared, and which, as the reading progressed, I observed was the draft of a will by Mrs. Beyer. Mr. Brennan read the will through, and when he had concluded the reading Mrs. Beyer said, "Where is Helen; where is Helen? You have left Helen out; Helen is to go into the will." Mr. Brennan said, "Who is Helen?" She said, "Why, my niece, Mrs. Johnson; she is to have a share with Louis." Mr. Brennan said he had misunderstood her, something to that effect, and he would have to prepare the papers again; that he had understood that she proposed to leave the bulk of her estate to Mr. Louis Beyer, Jr. The next day that we met, Monday or Tuesday—I do not recollect the day, however, the day the will was signed—I sat close to Mr. Brennan; by accident he came and sat down where I was sitting. I was sitting by Mrs. Beyer's bedside, and was so sitting that I overlooked the paper that Mr. Brennan read to Mrs. Beyer. As he read it, I followed in looking over his hand, and I heard him read it word for word as it was

134 written. When he concluded the reading of the will Mrs. Beyer said, "That is right; that is right."

Q. Who were present on that occasion? A. I do not know that I remember all who were present. Mr. Brennan was present and Dr. Atkinson.

Q. Was Dr. Atkinson present when the paper was being read? A. I do not think the Doctor paid any attention to the reading.

Q. Was he in the room? A. He was in the room, but I do not think he paid any attention to the reading of the will.

Q. After Mrs. Beyer made the statement that it was all right, what else was done? A. Then she proceeded to sign the will, and it was duly witnessed.

Q. Who witnessed it? A. Mr. Brennan witnessed it, Dr. Atkinson, and myself.

Q. You were all present at the same time? A. All present.

Q. Mrs. Beyer signed in the presence of all three of you? A. Yes, sir.

Q. You signed it in her presence and in the presence of each other? A. That is right.

Q. At the time she signed this paper was she, in your opinion, of sound and disposing mind and capable of executing a valid deed or contract? A. Perfectly so.

135 Q. Do you recall an occasion, a day or two before this final paper, when Mr. Sullivan was present? A. Mr. Sullivan was present the first day we went there to witness the will, but he was not present the third day.

Q. When you were called in to witness the first paper, do you remember in what part of the house you were when you were called? A. In Mrs. Beyer's bed-room.

Q. Were you there when Mr. Brennan arrived the first day, on Sunday? A. I do not remember. We all arrived about the same time. There was an hour fixed for us to be there. We all got there within a few minutes of each other.

Q. Do you remember whether you were present there two or three times for the purpose of signing papers? A. Twice.

Q. You do not think you were there three times? A. I do not think so. I have no recollection of three times. We were requested to be there at a certain time.

Q. Your recollection is that on the first occasion Mrs. Beyer made objection? A. Yes, sir.

Q. And it was because of that objection that Mr. Brennan took the paper away and came on a subsequent occasion? A. Yes, sir.

Q. What is your recollection of how long you were with Mrs. Beyer on Sunday or on the first day—the day the first paper was proposed? A. I think nearly a half hour; quite a half hour.

Q. What was her condition mentally on that day? A. Excellent.

136 Q. Do you remember whether or not you and Sullivan and Brennan signed a paper on the first occasion? A. I am pretty sure we did not. I am pretty sure we did not. I have no recollection of having done so.

Q. Your recollection is that you signed one paper only? A. Only one paper, because Mrs. Beyer said that Mrs. Johnson's name was not there, and no paper was offered for signature.

Q. And your recollection is that Mr. Sullivan took no part in witnessing the paper? He went away and did not sign as a witness. That is your recollection? A. That is my recollection.

Q. When you first formed the acquaintance of Mrs. Beyer, do you remember who composed the household? A. I cannot say as to the certainty about that. Mrs. Johnson was apparently the housekeeper. I think that Mrs. Stone, her husband, and little — were, as I understood it, boarding there—boarders—and Mrs. Beyer and Mr. Beyer, Sr., whom I very seldom saw.

Q. Was young Mr. Beyer living there? A. Young Mr. Beyer was there; yes, sir.

Q. What, if you know, were the relations between Mrs. Beyer and young Mr. Beyer and Mrs. Johnson? I mean as to whether they were affectionate relations or otherwise. A. Very cordial relations; very cordial relations.

Q. Do you recall at any time being asked by Mrs. Beyer whether she ought to make a will? A. She never spoke to me on the subject of a will, nor did I to her.

Q. After she made it did you have any discussion with her
137 about it? A. Never. After the signing of the will the subject was never mentioned.

Q. Do you recall when Mrs. Beyer went away for a brief visit to Virginia or elsewhere? A. I remember her going away, and I think she went to St. George's island at my suggestion. I thought it might benefit her by going to salt water. I think she was there. I am not sure whether it was in the month of June, the month before she died, or the year before. I do not recall. I simply know that she went away. I do not remember the date.

Q. Then you do not know anything about her going to Richmond? A. I never heard it—that is, I do not recollect it.

Q. Then your attendance upon her during the latter part of June and the first part of July was pretty frequent? A. From the 6th of July up to her death I saw her every day; sometimes more than once a day.

Q. It has been testified by some of the witnesses that during the period between the 6th and 14th of July, which was the date of the execution of the will, Mrs. Beyer's condition was such that she could not make herself heard, and that she was unable to express her wishes or to move about. What is the fact as to her mental condition during the period up from the 6th to the 14th of July? A. Feeble. Of course, she was feeble physically, and her voice, never very strong, but with my bad ears—I am sorry to say I am very hard of hearing—I could understand distinctly everything she said to me.

Q. It has been testified that her treatment was such as to stupefy her. A. She was given narcotics to relieve her pain. She
138 was not constantly under the influence of narcotics. Sometime she would have pain, which would call for a small dose of anodyne in the form of opium—powdered opium or morphine—but never enough to make her stupid. She was not under the influence of opium all the time.

Q. Upon the occasion of this final paper, had there been any abnormal quantity of morphine administered to her? A. Not at all. My impression is upon that day none was administered.

Q. It has been stated that champagne was adminstered? A. People with progressive diseases suffer from nausea—vomiting—and when other remedies fail we sometimes give champagne, with cracked ice, to relieve that condition—a tablespoonful of champagne, with a little cracked ice—not enough to produce any effect at all on the patient's mental condition.

Q. What effect would champagne have upon a narcotic? A. It

would rather counteract the effect of it. In her case it was not given for any such purpose.

Q. Tell us where St. George's island is. A. It is in the Potomac river, two or three miles below Piney Point, and about 90 miles down the river.

Cross-examination.

By Mr. POE:

Q. How long have you been a practicing physician? A. Thirty-five years last March.

Q. Of what college are you a graduate? A. Georgetown university.

Q. You are not a specialist, are you? A. No, sir.

139 Q. A general practitioner? A. General practitioner.

Q. I understood you to say that on the 12th of July you happened to be on a professional visit at Mrs. Beyer's when Mr. Brennan came there? A. No, sir; I said I went there. I intended to make a professional visit that day, but had been requested to meet there at a certain time to witness the signing of Mrs. Beyer's will.

Q. I think you said you were requested by Mrs. Helen B. Johnson? A. I think she told me the will was to be signed and requested me to be there that day.

Q. And there was a Mr. Sullivan there as well as Mr. Brennan? A. I think that was the name.

Q. Did you know him before? A. No, sir.

Q. Do you know his initials? A. I think they are M. P. Sullivan. I state that from seeing the sign at the corner.

Q. What is his business—grocery store? A. Liquor business—I do not know; I think so.

Q. Mr. Brennan came there at what hour? A. I cannot tell the hour.

Q. I believe you said that you were in Mrs. Beyer's room when he came? A. Yes, sir.

Q. And he came there with a paper which he produced and read? A. Yes, sir.

140 Q. If he says that he came there and sat down at her bedside and she dictated her will to him—told him what she desired her will to be—and he read it there in her presence, he is mistaken, is he not? A. I am not sure. As far as my recollection goes, Mr. Brennan read this paper. I have told you that I am not sure whether I got there first or Mr. Brennan. We all arrived there about the same time. It may be, now that you have asked this question, that he may have gotten there before I did and written it down—made this paper which he had in his hand when I saw him.

Q. You say he got there about the same time you did. How do you know that? A. Because I was to be there at a certain time.

Q. How long was the paper, and how long would it have taken him to write it there? A. It depends on how rapidly he writes.

Q. First, how long a paper was it? A. I think it took him five or six minutes to read it to Mrs. Beyer.

Q. That paper was not executed? A. Not to my knowledge.

Q. If Mr. Brennan said it was, and he afterwards burned it up in your presence, he is mistaken? A. I have no recollection of his burning it.

Q. When he says it was executed by Sullivan and you as witnesses at the request of Mrs. Beyer he is mistaken? A. That is my recollection.

Q. If he says it, his recollection differs from yours on that subject? A. On that subject it does.

141 Q. You say that early in 1896 symptoms of the malignant nature of her disease became pronounced? A. Yes, sir.

Q. An abdominal cancer is, of course, we are bound to believe, incurable, is it not? A. Unless it is very early detected, and it may be sometimes successfully removed by a surgical operation when it involves a limited a[illegible].

Q. This one had progressed so far that, in your opinion, it was incurable? A. Yes, sir.

Q. It was continually, then, progressing, was it not? A. Yes, sir.

Q. The patient was getting worse instead of better each day of her life? A. Yes, sir.

Q. Do you tell this jury that with this incurable disease her mind was not becoming weakened as well as her body by its approaches? A. There are two diseases, cancer and consumption, in which the mind is rarely affected. As the disease advances many times the mind becomes clearer than ever before.

Q. The disease strengthens the mind, rather than weakens it? A. It seems to bring it out, to make it brighter; not necessarily to strengthen it. I do not say in all cases.

Q. Do you remember whether this first paper that Brennan had there was typewritten or not? A. I do not.

Q. You do not remember signing it? A. No, sir.

142 Q. You do not remember Brennan signing it or Sullivan signing it? A. I do not.

Q. You do not remember the testatrix requesting either of you to witness it as her last will and testament? A. I do not.

Q. On this last Sunday when you and Dr. Wade Atkinson and Mr. Brennan—you met there for the purpose of doing what? A. I do not remember to have met these gentlemen there but twice. It seems from what I have stated that Mr. Brennan was there three times. It may be that Mr. Brennan the first time came there to write these notes down at Mrs. Beyer's dictation.

Q. He does not call it notes, but the will? A. I do not know that.

Q. He swears it was the will itself, and you afterward executed it there, and Dr. Wade Atkinson said that the purpose of your assembling there on Monday was to make a slight alteration in the will that had been already executed, in which he omitted the word "heirs." Do you remember that? A. I do not remember anything about that.

Q. Have you ever witnessed many wills in your life? A. Yes, sir; many.

Q. Do you ever remember one ever before read to the testator or testatrix by the professional gentleman? A. Yes, sir.

Q. How many? A. I cannot recall them. You ask me that, and I say yes.

Q. Do you know one? A. I know one.

143 Q. And these two occasions are all you can recall where the will was read? A. It has to be acknowledged.

Q. It is generally a private and confidential matter between the adviser and testator, is it not? A. I do not know.

Q. How much is your bill for your professional attendance on Mrs. Beyer? A. I have no bill; I have been paid.

Q. By whom? A. By the estate.

Q. Did you ever present any bill in the orphans' court and have it approved and have it passed? A. Yes, sir; I did.

Q. When was it paid? A. I think it was paid about a month after the death of Mrs. Beyer—shortly after Mr. Beyer bonded, qualified.

Q. Did you ever see Mr. Beyer, Sr., there on the occasion of the alleged execution of either of these papers? A. I do not recollect seeing him there.

Q. Do you not recollect that he was not there? A. That is my recollection, that he was not there.

Q. Louis Beyer, Jr., was there? A. I do not know about that, but I think he was.

A. And was not Mrs. Johnson there? A. I know she was there or thereabouts.

Q. Do you not think that Louis Beyer, Jr., was there or thereabouts? A. I think so; I saw him about the house.

Q. On that occasion? A. Yes, sir.

144 Q. When Mr. Brennan says he was not there and did not see him, he was mistaken?

Mr. RIDOUT: That is an unintentionally inaccurate statement of Mr. Brennan's testimony, which was that Mr. Beyer was there and brought in a pen and ink.

Mr. POE: I do not so understand Mr. Brennan's testimony.

After discussion:

The COURT: Fanny Perry said Louis Beyer, Jr., was going through the hall with pen and ink, but I do not remember whether Brennan gave the name of the person who got the pen and ink.

(By Mr. POE:)

Q. Was Dr. Wade Atkinson a friend of yours before this? A. I do not know that I should call him a friend. We are on personal terms.

Q. You are professionally acquainted with each other? A. Yes, sir: that is all.

Q. I understood you to say that this lady was not all the time

under the influence of morphine. Was that your language? A. Yes, sir.

Q. Does a person recover immediately and rapidly after being under the influence of a narcotic of this kind or gradually or slowly? A. It depends on how much is taken. Where a medicinal dose is taken, the stupor—we do not want to produce—we simply give enough to alleviate the pain; then the patient will drop into a slumber because of the relief from pain, but that is not an opiate.

Q. Did you use this as an anodyne and not as a narcotic? A. As an anodyne.

145 Q. That is to relieve pain and not to produce sleep? A. Yes, sir.

Q. Would Mrs. Beyer rest well when without pain? A. Sometimes she would rest well and then again her nights would be restless.

Q. She was not up and about after the 6th of July, was she? A. The last few weeks of her life she kept her bed pretty much all the time, except when she got up to respond to the calls of nature.

Q. She had, of course, to be assisted then? A. Generally.

Q. Do you remember who were present on the execution of this paper, on the 14th of July, 1896—the paper in controversy? A. I do not know who were present except those who witnessed the will and Mrs. Beyer and myself. This has been six years since it transpired and these details I am giving to the best of my memory.

Q. That is what I am trying by my cross-examination to get at—the best memory you have. I want to refresh it. You remember that you were requested by Mrs. Johnson on the first occasion to meet Mr. Brennan? A. I think so.

Q. How did you happen to meet him on the second occasion? Was that at the request of Mrs. Johnson also? A. I think there was an understanding between us that we would come back when Mr. Brennan brought the correct paper.

Q. That is, corrected in the respect that Mrs. Johnson had been left out? A. Yes, sir.

146 Q. Mr. Brennan corrected it in the respect that he had only created a life estate in Louis Beyer, Jr.? A. I do not remember about that.

Q. He testified that the first will he drew for this old lady he intended to leave *to* the residuary estate in fee-simple to Louis Beyer, Jr.; that when he got to his office he examined the will which he had taken with him and found that he had left out the word heirs and he was afraid that he had only created a life estate, so that he corrected that himself and brought the corrected paper back on Monday afternoon to be executed, and that Dr. Atkinson was there, and that you were there, but for some reason it was not executed on that Monday. Now, are you sure that he is not right about that? A. My recollection does not serve me to answer to that feature. I do not remember distinctly about that.

Q. Do you not remember that it was on the second occasion that he came back that this exclamation about Mrs. Johnson was made, and

that it was made by Mrs. Johnson and not by Mrs. Beyer? A. Most emphatically, you are wrong. That is one thing that I do remember distinctly—that Mrs. Beyer exclaimed positively and with more emphasis than I thought she was capable of, "Where is Helen? You have left Helen out of the paper; I want her to go in;" and Mr. Brennan asked, Who is Helen? and she said, "My niece, Mrs. Johnson; she is to share equally with Mr. Beyer."

Q. You do not know when that occurred? A. It occurred when I was there.

Q. On which one of these three occasions was it that it occurred? A. I cannot be any more exact than that.

147 Q. Do you say that champagne will not make people drowsy? A. I should think it would if you take enough of it.

LOUIS BEYER, JR., a witness on behalf of the caveatees, having been first duly sworn, testified as follows:

By Mr. RIDOUT:

Q. Your name is Louis Beyer, Jr.? A. Louis Beyer, Jr.

Q. What was your name originally? A. Charles Louis Smith.

Q. What relation were you to Mrs. Mary Beyer, deceased? A. Nephew.

Q. Son of a deceased sister of hers? A. Yes, sir.

Q. Do you know, from what you have heard, where you were born? A. I was born in Mrs. Beyer's residence in this city.

Q. Where was her residence at that time? A. At the corner of 2d and N streets N. W.

Q. How long did you continue to reside at Mrs. Beyer's residence? A. All my life.

Q. How old were you when your mother died? A. I cannot recall. I was an infant.

Q. What is your opinion on that subject—what has your aunt ever told you on the subject? I mean Mrs. Mary Beyer. A. With reference to what?

148 Q. To your age when your mother died? A. From what I recollect, I imagine I was about three years old; maybe a little younger.

Q. Who took charge of you upon your mother's death? A. Mrs. Beyer.

Q. By what name were you known in the family? A. Always called Beyer from that day.

Q. How did your aunt address you or treat you—as a nephew or a son? A. It was understood that I was adopted by her from the time of my mother's death.

Mr. POE: I object to that.

Mr. MACKEY: That is a family matter.

Mr. POE: You cannot understand that you are adopted. There is a legal way of doing that. That is not a question of pedigree.

The COURT: I think you have a right to prove what was actually

done and what was actually said about it. I should say that the expression "it was understood" is rather too indefinite.

By Mr. RIDOUT:

Q. How did you understand it? A. By being designated as son.
Q. By whom? A. By my aunt.
Q. Mrs. Beyer? A. Yes.
Q. Was she accustomed to speaking to you as her son? A. She never addressed me by that term; she always addressed me by name.

149 Q. I understand that you continued to live with your aunt until her death? A. Until her death.

Q. When did your aunt, if at all, first speak to you on the subject of her making a will? A. Some time prior to her death.
Q. About how long? A. I should say about two months; probably less than that; probably one month; some time during the month of June.
Q. Do you remember what she said? If so, state what it was. A. My recollection is that her intention——
Q. State what she said. A. She stated that she would make a will leaving the property to me, knowing that my conscience would allow me to perform what she wanted to do—by making an equal division of the property with her niece, Helen B. Johnson. I was to dispose of one of the small houses in the rear to accommodate the wants of our uncle.
Q. Louis Beyer, Sr.? A. Louis Beyer, Sr.
Q. You spoke of Mrs. Johnson. What is her relation to Mrs. Beyer? A. Niece.
Q. When did she go to live at Mrs. Beyer's house? A. As far back as I can remember.
Q. How long did she live there? A. All her life—all our life.
Q. How was she treated by Mrs. Beyer? A. The same as an adopted daughter would be treated.

150 Q. Do you know what Mrs. Beyer's impression was prior to her decision to make a will as to the rights of her husband in the event she should die without making a will?

Mr. POE: I object to that.

Mr. RIDOUT: We purpose following that up by showing what Mrs. Beyer's information was as to the legal rights of Mr. Beyer, and then her decision.

The COURT: The proper way for you to proceed would be to ask the witness what the testatrix said on that subject.

(By Mr. RIDOUT:)

Q. State anything that Mrs. Beyer ever said in your presence in regard to the rights of her husband in the event of her dying without making a will. A. She did once or twice in conversation ask what Mr. Beyer would have in the event of her dying without making a will.
Q. Do you know when it was that she learned that he would not

inherit in the event of her making no will? A. I think it was up to within two weeks prior to the time when the will was made.

Q. Do you recall whether Mrs. Beyer informed you at any time that if no will was made Mr. Beyer would not inherit? A. She found out that in the event no will were made the sisters would become heirs to the property.

Q. Has there been any child born to Mr. and Mrs. Beyer? A. No, sir.

Q. Please fix as nearly as you can the execution of the will—when Mrs. Beyer first spoke to you of her intention to make a will. A. As I said, I think it was about two weeks before.

Q. That would be about the first of July, 1896? A. It
151 was probably a few days before she went away on a visit to St. George's island. Her intention was to execute the will.

Q. When did Mrs. Beyer first, if at all, give you instructions to cause a lawyer to come to the house in connection with her proposed will? A. Immediately on her return.

Q. That was what day? A. I cannot recall the day, but I think it was about a week before the will was executed.

Q. What did you do or say to her when she spoke to you of having a lawyer make the will? A. As a matter of fact, for convenience, I suggested the name of an attorney in the neighborhood.

Q. What is that gentleman's name? A. Mr. Oscar Nauck.

Q. That was on the Sunday prior to the 14th of July? A. Yes, sir.

Q. What did Mrs. Beyer say in response to your suggestion that she have Mr. Nauck? A. She had some objection to Mr. Nauck; she did not care to have him prepare the will.

Q. Then what did you do? A. Then, as a matter of convenience, Mr. Brennan's name was the first to spring into my mind. I suggested him, and she was satisfied.

Q. How long had you known Mr. Brennan? A. Twelve years.

Q. How intimately? A. I cannot say that I ever knew him intimately. We were in the same building together, but we were
152 never associated in business.

Q. Associated together socially in any way? A. No; never.

Q. You have stated that Mr. Brennan's name came into your mind. What did you do? A. When I suggested Mr. Brennan's name, Mrs. Beyer told me to obtain him.

Q. What did you do? A. I immediately boarded a car and went to Mr. Brennan's residence and requested him to call at the house. Mr. Brennan asked me if I had paper at the house that would be suitable. I said, No. He said, I will go up by the office and get the paper; which he did.

Q. At what time did he arrive at the house? A. I think in the afternoon, about half past three.

Q. What happened after he arrived there, so far as you have personal knowledge? A. Why, he was introduced to Mrs. Beyer.

Q. By whom? A. By me. And I left him there in her room.

Q. Where did you go? A. I think I went downstairs.

Q. When did you next see Mr. Brennan—on that day I mean? A. When he departed.

Q. Did he give you any information concerning what had transpired in the room? A. None whatever.

Q. Do you remember whether you went to the room, or to the door of the room, during the time he was there? A. On which occasion?

153 Q. I mean on this first occasion. A. Yes; I obtained the pen and ink necessary for the writing.

Q. What did you do with it? A. I gave it to Mr. Brennan and immediately left the room. As a matter of fact, I did not enter the room.

Q. Did you go there again at that interview? A. No, sir; I was about to say, as a matter of fact, I knocked at the door, called Mr. Brennan to the door, and delivered the pen and ink there.

Q. When did Mr. Sullivan arrive, if at all? A. Mr. Sullivan was requested to come a few minutes after Mr. Brennan got there.

Q. Do you remember who requested Mr. Sullivan to come there? A. I think I went to the house.

Q. And you told him that you wanted him to witness this will? A. Yes, sir.

Q. When did Dr. Smith arrive? A. Dr. Smith arrived, I think, a few minutes after Mr. Sullivan.

Q. Was Dr. Smith sent for to witness the will on that occasion, or was it a professional visit? A. I do not know whether it was a professional visit. I cannot remember whether he was there earlier in the day or not.

Q. When do you remember Mr. Brennan again coming? A. Mr. Brennan came on the following day.

Q. Were you there when he came? A. I think not. I was at work.

154 Q. Do you remember what time of day it was? A. No, sir.

Q. You say you were at work. What is your business? A. I am associated with M. M. Parker in the real-estate business.

Q. What are your office hours? A. From half past eight until after four.

Q. Then you have no personal knowledge of Mr. Brennan's coming or what transpired on the second occasion? A. On Monday; no sir.

Q. On Tuesday, what is your recollection of what transpired in respect of the will? A. I was not present on that occasion.

Q. Where were you? A. At the office.

Q. You have no personal knowledge of the hour Mr. Brennan arrived on that occasion? A. No, sir.

Q. You have said something about a conversation in which Mrs. Beyer gave you some instructions in respect of Mrs. Johnson? A. Yes.

Q. What were those instructions? A. Why, she had previously told me that her intention was to leave the property in my charge

in fee-simple—that is, that her will would give the property to me—and she had enough confidence in me to know that I would carry out her intentions, which she had expressed, as I said before.

Q. Please state what her intentions were. A. That I was eventually to give half the property to Mrs. Johnson. She was to
155 own jointly with me. During the lifetime of our uncle we were to retain the home, and during his lifetime sell one of the houses.

Q. In the conversation with her did Mrs. Beyer give you any reason why it was that she gave him a home? A. No; just stated it.

Q Did she say anything about an absolute estate? A. She did not leave the property to him for fear it would be lost.

Q. State what she said. A. She has often said to me and to others——

Q. State what she said to you—the substance of it. A. That too much money had been wasted prior to that time on inventions, of which he has quite a number, and lost in that way.

Q. Have you any knowledge of the fact that Mr. Beyer has lost money in promoting inventions?

Mr. POE: I object.

The COURT: That is a circumstance.

The WITNESS: I have.

By Mr. RIDOUT:

Q. After the death of Mrs. Beyer when did you first obtain any information concerning the actual contents of the will and from whom? A. After her death?

Q. Yes. A. I obtained the information through Mr. Brennan.

Q. When did he tell you that? A. I think it was on the following—the second day after the funeral.

Q. What day of the week was that? A. The third, I think; on a Tuesday.

156 Q. That would be Thursday, probably, of that week? A. On Thursday.

By Mr. POE:

Q. That would be July 30? A. Yes, sir.

Q. Prior to that time had you any knowledge except from what Mrs. Beyer had said to you of the contents of the will? A. No, sir.

Q. What did Mr. Brennan do with the will finally after Mrs. Beyer's death? A. Mrs. Johnson and I were requested to come to his office, and the will was opened and read to us.

Q. Then what was done with it? A. The will was delivered to us. I handed it to Mr. Hoehling to be probated.

Q. What did you do in respect to discharging duties as executor? A. In what particulars?

Q. Did you qualify?

Mr. POE: The best evidence is that he would not be here as defendant unless he had.

The WITNESS: Yes, sir.

By Mr. RIDOUT:

Q. A deed has been offered in evidence from you and Mrs. Johnson to Mr. Beyer. State the circumstances of that deed. A. The circumstances were these: When Mr. Beyer received knowledge that there was a will in existence he made things very disagreeable with both Mrs. Johnson and me, and not as a matter of compro-
157 mise, but as a matter of duty, we both deeded him, not the rear part, as expressed here, but nearly all, except the home site. He had the frontage on Brightwood avenue, as well as the rear.

Q. How was the frontage on 8th street improved? A. Improved by six two-story brick dwellings.

Q. Are those the dwellings to which you alluded when you said Mrs. Beyer instructed you to sell one or two of those under certain circumstances? A. Yes, sir.

Q. Did Mr. Louis Beyer, Sr., continue to live in the family home? A. No, sir.

Q. When did he remove therefrom? A. We left the house ourselves first. Things got so unbearable and such a hardship for Mrs. Johnson that she determined to rent property elsewhere, which she did.

Q. And you moved away and the old gentleman remained there? A. He remained there temporarily, and then finally moved himself.

Q. And you and Mrs. Johnson moved back? A. Yes, sir.

Q. How long before his second marriage? A. Only a month or so.

Q. When your aunt spoke to you of her wish to make a will on that Sunday, do you recall any questions she asked you in respect to its validity if made on Sunday? A. Yes, sir.

Q. What did she say? A. She asked if it would be legal.
158 Q. What did you do in response to that? A. I could not determine the question then, and I looked the matter up by reference to an encyclopædia we had, and we found that it would be.

Q. What? A. That a will executed on Sunday was a good will.

Q. Did you state that to her? A. Yes, sir.

Q. Was that before you went for Mr. Brennan or after? A. Before I went to Mr. Brennan.

Q. Do you know when Mr. Beyer, Sr., first learned of the fact that the will had been made and how? A. I think it was the day following the funeral. That was on Wednesday—on the morning of Wednesday.

Q. There has been some testimony here about the fact that Mrs. Stone went from Mrs. Beyer's house to see an encampment on the White Lot? A. Yes, sir.

Q. State what your recollection is of that circumstance. A. At the time my horse and carriage were in the stable. I think it was the intention—in fact, I know it was the intention—of Mrs. Johnson to take the children down to the White House, and for that purpose I

left the disposition of the horse to them and used a car in going to Mr. Brennan's house. When I returned—in the meantime Mrs. Stone and her daughter came to the house, and, as a matter of courtesy, the invitation was extended to them, which she accepted.

Q. Do you recall whether after Mrs. Stone left there she came back that evening? A. Yes, sir; she returned to the house.

Q. Before she went home? A. Yes, sir.

159 Q. Did she go to see Mrs. Beyer after she got back? A. I think so.

Q. Do you remember what time in the afternoon it was when Mrs. Stone returned? A. Do you mean from the encampment?

Q. Yes. A. About half past six or seven o'clock, I think.

Q. Do you remember whether you saw the witness Fanny Perry at the house when the will was being executed on the first occasion—on Sunday? A. She may have been at the house. I presume she was.

Q. Do you recall meeting her in the hall and sending her downstairs? A. I do not.

Q. It is a fact that by decree of the court your name was changed from Charles Louis Smith to Louis Beyer? A. Yes, sir.

Q. State why that was done. A. Why, it was suggested to me by Mr. Hoehling. It had always been assumed. I assumed, through neglect or probably through ignorance, that the change did not have to be effected by act of court. They took it for granted that the assuming of the name was sufficient.

Q. By what name had you been known all your life? A. By the name of Louis Beyer, Jr. There are thousands of records to that effect. I might say that that decree was retroactive, too.

Q. The witness Perry testified that on one occasion she heard a conversation between you and Mrs. Johnson, in which Mrs. Johnson asked you to ascertain what would be the effect if Mrs. Beyer made

160 no will, and expressed her determination to see that Mrs. Beyer did make one. What is your recollection on that subject? A. I do not recall such a conversation. I think Mrs. Beyer requested me to see what effect it would have if she made no will.

Q. As a matter of fact, was any plan formed between you and Mrs. Johnson to procure the execution of a will by Mrs. Beyer?

Mr. Poe: I object to that. Whether there was a plan formed is the question for this jury to try. Get at the fact and let the jury say whether there is a plan or conspiracy. That is the fact for the jury and not for the witness.

The Court: The only question I have about it is the form of the question. That the witness has a right to testify upon that point, as to whether he and Mrs. Johnson made an agreement to get a will, and in pursuance of that agreement did get it, I have no doubt; but the form of that question is a little shaky. I think you have the right to put the question directly to the witness as to whether he used any influence—urged or persuaded this woman to make the will, and whether Mrs. Johnson did.

Mr. RIDOUT: I will put it that way. (To the witness:) What, if any, efforts did you make to procure the execution of this will by Mrs. Beyer?

A. None whatever.

Q. So far as you have personal knowledge, did Mrs. Johnson make any such efforts? A. Not that I know. I think not.

Q. Did she and you in combination make any such efforts? A. No, sir.

161 Cross-examination.

By Mr. POE:

Q. I understood you to say that you are a real estate-broker and agent here in Washington. A. I am not a broker in the term used. I am with Mr. Parker and have been with him.

Q. Mr. Myron M. Parker, 1418 F street? A. Yes, sir.

Q. That is the same building in which Mr. Brennan has his office? A. Yes, sir.

Q. You have been in Mr. Parker's employ how long? A. Twelve years this month.

Q. You and Mr. Parker have a good many real-estate dealings together? A. We have a few; I cannot say a great many.

Q. A great many dealings pass through your office involving the examination of papers. Is Mr. Brennan employed by the firm of M. M. Parker for that purpose? A. Never, never. All our papers are prepared by a title company.

Q. How old are you? A. I was thirty-one last month.

Q. Where does Mr. Brennan live or where did he live in 1896? A. He lived on the corner of 4th and M streets N. E.

Q. Mrs. Beyer was quite a sick woman on the 12th of July, when she asked you to go for somebody to draw a will? A. I had no reason to think so more than at any time previous.

Q. Why did you look up in an encyclopædia to find that
162 a will could be executed on that day and then go and get a lawyer to go and execute the will? A. Merely because she requested me to.

Q. You went to oblige her? A. Yes, sir.

Q. Were you in the room on Sunday when the first will was executed? A. No, sir.

Q. You heard Mr. Brennan's testimony in reference to that will and its execution? A. I did.

Q. What have you to say about that? A. I think Mr. Brennan's testimony is correct.

Q. You think that the will making you the sole legatee and creating a life estate in your uncle, inadvertently doing so, was actually executed and acknowledged by your aunt on the 12th day of July, 1896? A. Yes, sir.

Q. You also think that in 72 hours your aunt executed two wills? A. Yes, sir.

Q. Now, you say you made no exertion to have this will executed? A. No.

Q. You went to the man who was to draw it? A. Yes, sir; at her request.

Q. Answer my question. You went for the man to draw it, did you not? A. Yes; as I stated before, I suggested another attorney.

163 Q. Answer my question, and if you have an explanation to make you can make it. You went for one of the witnesses, did you not? A. Yes, sir.

Q. And Mrs. Johnson requested the other witness to be present? A. I think that that information is wrong. I believe that Dr. Smith, after recalling the circumstances, volunteered to act as a witness.

Q. You want to contradict Dr. Smith? A. Not contradict. I think it escaped his memory.

Q. You do not think that Mrs. Johnson knew that you had gone for Mr. Brennan to draw a will? A. Oh, Mrs. Johnson knew it; yes, sir.

Q. She knew that you were going to bring Mr. Brennan back with you or send him back? A. I suppose that was the intention.

Q. How long was Mr. Brennan in there by himself with your aunt? A. I think over an hour.

Q. Dr. Smith makes a mistake in that respect when he thinks Mr. Brennan was there only a few minutes? A. Dr. Smith's testimony was not to that effect. He said he could not tell quite how long Mr. Brennan had been there before.

Q. He said a few minutes. He was there by appointment? A. He may have been there by appointment; but he said that he did not know how long Mr. Brennan had been there before. I think that was his testimony.

Q. You think Dr. Smith made a mistake when he said that Mr. Brennan came there with a will already drawn, do you not? A. Why, certainly.

164 Q. Did you say that before? A. No, sir.

Q. You say that you are not on particularly intimate terms with Mr. Brennan? A. No, sir.

Q. But you knew the nature of the paper which was about to be executed by your aunt? A. Only from what she had told me.

Q. The general nature, from your conversations with her? A. Yes, sir.

Q. You knew that Mr. Brennan came there and the paper had been executed, and you permitted him, a comparative stranger, to take it away with him, and never demanded it? A. I did not know that I had any reason to demand it.

Q. You knew that you were the sole residuary legatee? A. I cannot say that I did. I did not know but what she might have changed her mind from what she had spoken to me about.

Q. Was she apt to change her mind? A. I do not know that she was.

Q. Was she a woman of strong will? A. Yes, sir.

Q. She made two distinct wills in 72 hours? A. Yes, sir; I think Mr. Brennan stated that it was his fault.

Q. If Mr. Brennan is correct, she made three wills in 72 hours. Now, you think this was stated in the will—that if it was desired you might sell off a few of the houses? A. No; that was her verbal instructions.

165 Q. That is, if occasion required to sell off one or two of the lots in the rear; that was your language? A. Yes, sir.

Q. Will you be kind enough to look at this will and see if you find any such provision as that in it? A. I did not say that was in the will; I say that was in the conversation. She instructed me some time before the will was executed.

Q. You say you had a disagreeable and uncomfortable time in consequence of the execution of this will and its peculiar provisions up there, as to how you should live together? A. Yes, sir.

Q. Tell us a little more in detail what those times were, and what the conversations were between you and Mrs. Johnson and your uncle. A. As a matter of fact, my uncle was disappointed, in fact he supposed the property was to go to him.

Q. He had never been invited when your aunt was making the will? A. As a matter of fact, he was away from the house.

Q. Was he present on either of those occasions? A. No, sir.

Q. Was he in the house on either of those occasions? A. No, sir.

Q. Was he informed that she was about to make a will? A. Not that I know.

Q. Do you not know that he was? A. I do not.

Q. Do you not know that you swore that he first knew it July 30, 1896? A. Put the question again.

166 Q. Did you not swear that your uncle first knew that the will had been executed on the 30th of July, 1896, and he made it so warm for you up there on the 30th that you executed this deed? That was not a compromise, but it was one out of your sense of justice. A. That is about the fact.

Q. Did you leave the house when Mrs. Johnson did? A. I did; yes, sir.

Q. How long did you stay away? A. Three months.

Q. Did you leave your uncle in sole possession? A. Yes, sir.

Q. Whereabouts did you and Mrs. Johnson go? A. Moved on Spruce street, Le Droit Park.

Q. Then your uncle moved away and you came back? A. Yes, sir.

Q. It was impossible for you to get along in the same house after your aunt died? A. That was the cause of our moving.

Q. Was not the will the cause of that unpleasantness? A. The effect of the will.

Q. The will itself? A. The fact that he did not get the property; the will had been made and he got out.

Q. How about sending his clothes down to Florida avenue? A. I did that on an order of his attorney.

Q. Have you that order? A. Yes, sir.

Q. Let us see it (examining paper). Then, when he moved

away you and Mrs. Johnson came back there to reside, and
167 you have resided there ever since, have you? A. No; I resided there until December, 1897.

Q. Does Mrs. Johnson still reside there? A. Mrs. Johnson still resides there.

Q. Were you present some time in the month of May, 1896, and about the 11th, I think it was, when your aunt borrowed $2,800.00 from the Riggs bank? A. Yes, sir.

Q. Do you know what was the object of her borrowing that money? A. Yes; there was a mortgage of the same amount which had matured at that time, and a new loan had to be negotiated to take care of it.

Q. Was the money from the same people? A. No, sir; different parties—mortgaged through the office of Simon Wolf and Cohen.

Q. So that no money passed? A. No, sir; the same amount, $2,800.00, dollar for dollar.

Mr. RIDOUT: Do you offer that paper? You called for it.

Mr. POE: I suppose I am bound to have it in as evidence. I called for it and looked at it. (To the witness:) Do you swear that Mr. Brennan did not tell you that he was afraid that this first will created only a life estate in you?

A. Yes, sir.

Q. It was his own suggestion that that will should be changed and the words "heirs" put in, so far as you know? A. He never suggested it to me.

Q. I say it was his own suggestion. A. That there should be a change?

Q. Yes. A. Yes.

168 Q. And he had never seen your aunt before and was only slightly acquainted with you? A. Twelve years. I said twelve years.

Q. You said slightly? A. Slightly in effect.

Q. Did you hear your aunt scream out and make this outcry that Dr. Smith described "Where is Helen's name?" when he presented the will to her on Sunday? A. No, sir.

Q. Where were you at that time? A. I was downstairs.

Q. You said that you do not recall the fact of meeting Fannie Perry in the hall as you went with the pen and ink in your hand into the room? A. Yes.

Q. You do not say that you did not meet her; you might have met her? A. I do not think I did meet her.

Q. You do not recall it; it was a trivial circumstance at the time and did not make any impression on your mind; is that what you mean? A. That is it—not particularly.

Q. Why did you not employ a lawyer to have this will drawn for your aunt? A. Why, Mr. Brennan, I believe, was a member of the bar at the time the will was prepared.

Q. He is not a practicing lawyer? A. That makes no difference.

Q. You are in one of the largest real-estate houses in town here

and you have occasion to see the difficulties under wills. Do
169 you not think it requires an experienced man to draw a will that disposes of over 20 or 30,000 dollars? A. You overstate the amount.

Q. How much is it? A. I think the property would be nearer $12,000.00.

Q. You made an affidavit that it was more. A. $16,000.00—nearer $16,000.00 than $30,000.00.

Q. Why did you go to an inexperienced man instead of going to some friend? A. I had no friends. Mr. Brennan was the first name that suggested itself to me.

Q. Mr. Nauck, you say, is a notary public out there? A. Yes, sir.

Q. He is a practicing lawyer, is he not? A. Yes, sir; I think so.

Q. And your aunt had some objection to him? A. Yes, sir.

Q. Who is the nearest lawyer in the neighborhood? A. Mr. Nauck.

Q. Who is the next nearest? A. I have not the slightest idea.

Q. You do not know whether there is any other nearer than Mr. Brennan? A. No, sir.

Q. There was a good deal of haste in having that will executed on Sunday? A. No haste at all.

Q. How long have you known Dr. Wade H. Atkinson? A. I do not know the gentleman.

Q. What hour in the day of July 30, 1896, was it that Mr. Brennan told you first of the contents of this will? A. What hour in the day?

170 Q. Yes. A. I think it was in the morning some time.

Q. That is a little indefinite. Let us get a little nearer than that. What part of the morning? A. I should say about noontime—some time like that—the best I can recall.

Q. Did you go home and tell your uncle that there was a will? A. No.

Q. Who told it? A. He had been told before.

Q. By whom? A. Mrs. Johnson.

Q. Mrs. Johnson told him? Did she know the contents of the will? A. No, sir; she simply informed him that there was a will; that was on the morning following the funeral.

Q. Did Mrs. Johnson know the contents of the will that was destroyed? A. Not that I know.

Q. She knew it was destroyed, did she not? A. Yes.

Q. Did she know her name was not mentioned in it? A. No, sir.

Q. How did she know the contents of it? A. I said she did not know the contents.

Q. I think you said she did. A. No, sir; I did not.

Q. She knew that one had been executed? A. Yes, sir.

Q. It was not because Mrs. Johnson preferred to have her estate in black and white instead of trusting it to you that this
171 second will was executed, was it? A. I think not.

Q. Your aunt's physical condition, I believe, was continu-

ally retrograding—she was gradually sinking from the time she went to bed, on the 6th of July, up to the time of her death? A. I did not notice it particularly about the time around the 14th; later I did.

Q. All right up to the time this will was drawn, was she not? A. And until some time after.

Q. There was only twelve days intervening. What do you mean by some time? A. Up to the 14th and up to the day the will was executed.

Q. Then when these doctors say the disease was progressive they make a mistake—she was not getting worse daily? A. I do not say that. I say I did not notice it. I am not a physician.

Q. I understood you to say that there were six small houses on 8th street? A. Yes, sir.

Q. Do you know what the front depth of them was, just in a general way—how many feet front? A. The front is 74 feet and a fraction.

Q. Each house, I mean. A. That I cannot say. There are six houses.

Q. Of the same size? A. Of the same size, with the ex-
172 ception of one that has a passageway under it for a driveway.

Q. How much do they rent for a month? A. They did rent for $10.30 a month.

Q. Was that net? A. That was net.

Q. After paying the water rent? A. The present rent I cannot say. I have had no connection with the property since the deed was given to Mr. Beyer.

Q. The deed to him included all those houses? A. Yes, sir.

P. J. BRENNAN recalled on behalf of the caveatees.

By Mr. RIDOUT:

Q. Can you tell us where it was that you burned the first paper which you prepared and which you stated on yesterday you did burn? A. After the execution of the present will by Mrs. Beyer I tore the written will up, the will that was written on Sunday afternoon, tore it up. I put it in my pocket, and after I got to my office I burned it up in the grate. I destroyed the will in the presence of Mrs. Beyer.

Q. Tore it up in the presence of Mrs. Beyer? A. Yes, sir.

Q. Did you on the Sunday or any other occasion have any other conversation with Mrs. Johnson about the contents of that first paper? A. No, sir.

Q. Did she request you to make any change in it? A. No, sir.

173 Q. When, if at all, did you ever have any conversation with Mrs. Johnson about any of the wills? A. Never had any conversation with Mrs. Johnson about any of the wills until after the death of Mrs. Beyer, when I requested Mr. Beyer to have Mrs. Johnson and himself come to my office.

Q. When did you first meet Mrs. Johnson? A. I think it was on that occasion. It was on that occasion.

Cross-examination.

By Mr. POE:

Q. Who let you in on the 12th of July, when you first went there? A. I do not remember now.

Q. Do you remember whether it was a colored girl? A. No, sir; I do not. The door was open.

Q. The door was open? A. Yes, sir.

Q. You went right in? A. I think there was some people in the hallway who ushered me upstairs. I do not know just who they were.

Q. Did they know you? A. I do not know.

Q. Did they know your business? A. I do not know.

Q. For whom did you ask them? A. Mrs. Beyer.

Q. And without any question they told you to go upstairs? A. Yes, sir.

174 Q. You do not know who they were? A. No, sir.

Q. Were they male or female? A. I do not remember.

Q. How many were there? A. I do not know; I do not remember.

Q. I think you said that Dr. Smith was upstairs when you got there? A. Yes, sir; that is my recollection.

Q. I am speaking now of my first occasion. A. Yes, sir.

Q. Were you not introduced to Mrs. Johnson on that occasion? A. No, sir.

Q. Were you not introduced to Mrs. Boss then? A. No, sir.

Q. Did you not see her? A. No, sir.

Q. How long was it after you got there that Mr. Louis Beyer got there? A. Before Mr. Louis Beyer?

Q. Junior; yes. A. I really could not tell you; I do not know.

Q. Do you know whether he was there when you got there? A. No, sir; I do not.

Q. You do not know whether you got there first after his visit to your office or he got there and met you? A. No, sir; I do not remember.

Q. You are not sure about that? A. No, sir.

175 Q. I do not mean your office; I mean your house. Of course, he went to your house? A. To my house; yes, sir.

Q. He went to your house and you went to your office and copied some paper and took it with you? A. I am not sure about that. No; I do not think I went to my office.

Q. Then he is mistaken when he said you went to the office and got the paper? A. I think I got the paper at my house.

Q. He said you thought you would go to your office and get the paper? A. He came in the neighborhood of one o'clock, and it was four o'clock when I went there. I had my dinner and went up there.

Q. Do you know whether you had the paper at your house or had

to go out and get it? A. My best recollection is that I had the paper in my house; in my desk. I do not think I went to my office.

Q. Do you remember what kind of paper it was? A. Legal cap.

Q. Do you keep that at your house? A. Yes, sir.

Q. What did you say to the person who let you in and who met you in the hall? A. I said I wanted to see Mrs. Beyer.

Q. Was any objection made to your seeing her at that time on the ground that she was a very sick lady? A. No, sir.

Q. You do not know the person who met you? A. No, sir.

176 Q. You were told to go right up stairs to her sick room? A. Yes, sir.

Q. You went up there and told her that you were the lawyer who was expected to prepare the will for her? A. Mrs. Beyer?

Q. Yes. A. Yes, sir.

Q. Did you tell her your name? A. I think I introduced myself to both Mrs. Beyer and Dr. Smith.

Q. I think you stated in your examination before that Dr. Smith was in the back room? A. He was in the back room after I commenced to talk to Mrs. Beyer.

Q. Then there was somebody with her when you went up there? A. Yes, sir.

Q. Did you know Dr. Smith before? A. I remember never to have seen him. Dr. Smith had known my family.

Q. Had you known him? A. No; I never met Dr. Smith before.

Q. Did you know him by sight? A. No, sir.

Q. As soon as you told your business to Mrs. Beyer he retired then? A. Yes, sir.

Q. Did you know he had an appointment there to meet you for the execution of that will? A. No, sir.

177 By Mr. RIDOUT:

Q. Do you remember at what hour you arrived on Monday? A. I think it was in the forenoon.

Q. Do you remember what time it was on Tuesday? A. I would not be certain about that.

By Mr. POE:

Q. Why was it that the alteration was not made on Monday, when you and Dr. Wade Atkinson went there together? He said for some reason the alteration was not made on that day. What was that some reason? A. Why the alteration was not made?

Q. Why the will was not executed? A. Mrs. Beyer wanted Mrs. Johnson's name put in the will—putting in writing what her verbal instructions were with reference to the first will.

Q. She did not make that objection on Sunday? A. No, sir.

Q. Dr. Smith has testified that Mrs. Beyer cried out, on Sunday, "Where is Helen? Why is her name not in the will?" And you asked her who Helen was. That did not occur on Sunday? A. I do remember an incident of her asking where Helen was. She wanted a drink of water, I think.

Q. Dr. Smith testified that she asked why was not Helen's name in the will, and that that occurred on Sunday, and that the will was not executed on Sunday? A. Mr. Smith is mistaken.

Q. She did execute a will then without Mrs. Johnson's name in it? A. Yes, sir.

HELEN B. JOHNSON, a witness on behalf of the caveators,
178 having been first duly sworn, testified as follows:

By Mr. RIDDICK:

Q. You knew the late Mrs. Mary Beyer, of course? A. Yes, sir.

Q. How were you related to her? A. I was her niece.

Q. What was your mother's name at the time Mrs. Beyer died? A. Elizabeth Maus.

Q. Where have you resided during your life? A. With Mrs. Beyer—wherever she resided.

Q. Do you know how old you were when you first went to live with her? A. Mrs. Beyer told me I was seven months old when she took me.

Q. Where did you remain from the time she took you down to the time of her death? A. With the exception of 20 months, with her.

Q. How long had you been living at her house before her death? A. About 12 years.

Q. What were your duties in the household? A. I took the place at the bar. I did everything that came to hand; helped Mrs. Beyer in everything.

Q. Who kept the house? A. As long as Mrs. Beyer was able she did, and when her health failed I did.

Q. When, if at all, did you first learn of any intention on the part of Mrs. Beyer to make a will? A. The first time there was any conversation that I can recall with Mrs. Beyer about making a
179 will was in May before she died, when Louis was raising the mortgage money. I was in the yard, painting screens, and she came and sat down alongside me, and she told me that she was going to make a will. I asked her not to tell me anything about it. She insisted. She said she was going to leave the property so that Louis could have the control of it and Beyer the benefit of it for life, and then divide it equally between us.

Q. That was in May? A. Yes, sir.

Q. Prior to that time do you know of any statements made by Mrs. Beyer as to what was her intention about a will? A. Her intentions were never to make a will, but after she found that Mr. Beyer would not inherit the property she changed her mind.

Q. Something has been said about a visit Mrs. Beyer made to the country. Where did she go? A. She went 12 miles south of Richmond to the home of my mother-in-law.

Q. Who went with her? A. My daughter and my brother-in-law.

Q. When was the visit to St. George's island? A. The year before, in August.

Q. That was the year before? A. The summer before, in August.

Q. When did Mrs. Beyer return from her visit to the country? A. I brought Mrs. Beyer from Virginia on the first day of July.

Q. When was she compelled to take to her bed on account of sickness? A. Monday or Tuesday after we returned the
180 doctor advised her not to go downstairs, but to stay upstairs, as it weakened her to go up and down the steps.

Q. When did you first learn that she intended to make a will on Sunday, the 12th? A. That morning, I suppose.

Q. Do you remember how you learned it? A. She told me she was going to make one.

Q. Do you remember whether you arranged for any of the witnesses to be present? A. She asked me to ask Dr. Smith. She thought about making a will, and I asked about it, and the doctor said if she wanted the husband to keep the property she should have made the will when she bought the property, and I told her that.

Q. Did she at that time or any other time say what provision she intended to make for her husband? A. At that time?

Q. Or any other time? A. No other than as I told you before, that she would leave the property to Brother Louis, and Uncle Beyer was to have the rent.

Q. Was there any reason given why she did not leave him the property? A. Yes, sir; he was building a boat at the time.

Q. What sort of boat? A. A patent propeller, and she feared that he would put the money all in that.

Q. Did she say that was the reason? A. That is the reason she gave me.

Q. What part did you take in the way of procuring witnesses to the paper that was signed on the 12th, on Sunday? A. I do not know that I took any part. Dr. Smith proposed himself that he wanted to be a witness.

181 Q. Do you know how he learned that she was going to execute a will—whether she told him or you? A. I think I told him.

Q. After she asked you about whether she should make a will? A. Yes, sir; whether she would get better.

Q. And it was in reply to your question that he said he knew it? A. Yes, sir.

Q. Do you remember Mr. Brennan coming there? A. I remember Mr. Brennan being there.

Q. Where were you during the time he was there? A. Downstairs getting supper part of the time, and the other part of the time sitting in the garden with Mrs. Stone.

Q. Did you have any conversation with Mr. Brennan on that occasion? A. No, sir.

Q. Did you see him? A. I saw him walking through the hall.

Q. After the paper had been prepared and before he left did he say anything to you about its contents? A. No, sir.

Q. Was any discussion had between you as to whether your name was in the will or not? A. No, sir.

Q. When did Mrs. Stone arrive on that day? A. She came early in the afternoon; I would say about three or half past.

Q. And what happened? Did she go upstairs as soon as she came? A. She went upstairs and sat in the room with her
182 aunt and me for a while, and then I went down to get supper and she went down with me. Mrs. Stone went down with me, she and her little girl.

Q. She gave her testimony as to what happened afterward. Just state what happened to Mrs. Stone after she came downstairs. A. My little boy played the violin in the orchestra of the Christian Endeavor, and that filled the children with the desire to go to the White House on Sunday, and on Sunday their father said he would drive them down, and on that Sunday afternoon before he drove our children down to the ground he asked Mrs. Stone and her little girl to go, and they went. After he returned he drove Mrs. Stone and her little girl home to Brookland.

Q. She came back? A. He drove her home, and she must have come back.

Q. Did she see Mrs. Beyer the second time? A. Yes, sir; a few minutes only.

Q. When she saw Mrs. Stone that day what conversation transpired between Mrs. Beyer and Mrs. Stone, so far as you recollect? A. Nothing that I can recall—asking how her mother was and different things. I do not know anything particular that occurred that day.

Q. Do you remember a visit made by Mrs. Beyer to Mrs. Le Fevre shortly before Mrs. Beyer went to Virginia? A. Yes, sir; I went with her. My husband, brother-in-law, three children, and I went out to bid Mrs. Le Fevre a good-by before Mrs. Beyer went to the country.

183 Q. Just state what transpired. A. When we arrived there we found Mrs. Le Fevre very sick and several of the neighbors in helping the two daughters do for her. Mrs. Beyer was very sorry to see her so ill, and when she bade her good-by I remember she said, "Liona, I don't know which of us will be the first to go," because Mrs. Beyer was there and Mrs. Le Fevre.

Q. How long after that was it that Mrs. Beyer went to Virginia? A. The next day.

Q. Fanny Perry has testified that on this Sunday afternoon you said to Mr. Johnson that you wished him to take Mrs. Stone away to the Christian Endeavor meeting. What is your recollection about that? A. I did not say so.

Q. She has also testified that on a great many occasions she heard you ask Mrs. Beyer to make a will. What is the fact on that subject? A. She never heard me.

Q. Did you, in point of fact, urge Mrs. Beyer to make a will? A. No, sir.

Q. What do you know from anything Mrs. Beyer told you as to her original intention on the subject of making a will—as to whether she would make one or not? A. She always said she would not make one.

Q. Did she in connection with statements of that kind at any time say what——

Mr. POE: Now ——

Mr. RIDOUT: Let me finish my question.

Mr. POE: We do not want you.

184 Mr. RIDOUT: Strike that out. (To the witness:) What did Mrs. Beyer say in her conversation about Mr. Beyer in case she did not make a will?

A. That he would be her heir by law.

By the COURT:

Q. She gave that as a reason why she would not make a will? A. Yes, sir.

By Mr. RIDOUT:

Q. Do you know when, if at all, Mrs. Beyer learned that Mr. Beyer would not be her heir? A. Do I know it?

Q. Do you know about the time when she learned that? A. Yes, sir; about December before she died.

Q. Then it was in May, you say, that she spoke to you on the subject of making a will? A. Yes, sir.

Q. On the Sunday when the first paper was signed, do you recall whether any conversation was had about a will made on Sunday? I speak now of your personal knowledge. A. I heard her ask Louis Beyer, Jr.

Q. Do you know what she said? A. She asked him if a will made on Sunday would be lawful.

Q. When Mrs. Beyer said that Mr. Beyer would be her heir, what, if anything, did she say about what would become of the property after his death? A. That he would leave it to Louis and me.

Q. Did you at any time importune Mrs. Beyer to make a will in your favor? A. No, sir.

Q. Did you at any time consult with and form any agree-
185 ment with Mr. Louis Beyer, Jr., to do so? A. No, sir.

Q. So far as you have personal knowledge, did Mr. Louis Beyer, Jr., importune or urge his aunt to make a will in his favor? A. No, sir.

Q. On this occasion in May, when you say your aunt spoke to you of her intention to make a will, who introduced the subject? A. She did.

Q. A deed has been offered in evidence from you and young Mr. Beyer to Mr. Beyer, Sr. State the circumstances under which that deed was made. A. I always understood that the property was to be left to Louis and Uncle Beyer was to have the benefit of it, and at Uncle Beyer's death it would be divided between us, but when Uncle Beyer found out that there was a will he became very angry, and he said now he was dependent when he thought he would be always independent. I spoke to Louis about the matter and Louis told me that Mr. Brennan——

Mr. POE: No.

The COURT: No.

The WITNESS: I learned through Mr. Brennan that the property was divided between Louis and me. I said then that before Uncle Beyer should feel that I was trying——

Mr. POE: We are not bound by what she said.

Mr. RIDOUT: Here is a deed offered in evidence and here are the people talking about the execution of it.

The COURT: I do not know about the conversation. The witness can state the reasons that urged her to make the deed.

186 By Mr. RIDOUT:

Q. Tell what reasons impelled you to execute the deed. A. We did not want Mr. Beyer to think we wanted the property. I did that myself, and I told Louis that I would give my——

Q. Never mind about the conversation. A. I proposed to give my share, and Louis——

Mr. POE: Never mind.

The COURT: She has given the reason.

By Mr. RIDOUT:

Q. Fanny Perry says that on the day of the funeral after you returned you went up to Mr. Beyer and told him that there was a will, and he repelled you, and you put your arm around his neck. What about that? A. I did not that day.

Q. When did you first approach Mr. Beyer about the will? A. Wednesday morning.

Q. Where? A. Out on the porch.

Q. Was it so located that you had a free view of the whole porch? A. Yes, sir.

Q. Was Fanny Perry present? A. No, sir.

Q. Who was present, if you remember? A. Mrs. Boss, of Baltimore.

Q. Speaking of Mrs. Boss, what effort have you made to secure her attendance here?

Mr. POE: We object to that.

187 The COURT: Mrs. Boss was a nurse in the house at the time this will was made. There has been no evidence to show that she knew what was going on, except inferences that were drawn. You want to show a reason why you do not produce her as a witness.

Mr. RIDOUT: That is all.

The COURT: I think you have a right to do it, if this witness knows the fact that there is scarlet fever in the family now, as you say, and was at the time you wanted to take the deposition, and go so far as to state it. If somebody read it in a letter or somebody told it here it would be hearsay.

By Mr. RIDOUT:

Q. Have you any personal knowledge on the subject, or do you know what you do know from what somebody told you? A. I do not know positively that there is scarlet fever in the family.

Q. Did you send a messenger to her to procure her attendance?

Mr. POE: We object to that.

The COURT: I think you have a right to show that, and what the messenger reported.

The WITNESS: I sent a message by my uncle to Mrs. Boss, if the scarlet-fever case was not very serious, to be here yesterday morning, and I have not heard one way or the other.

By the COURT:

Q. You do not know whether the message was delivered? A. No, sir; I cannot see him until next Monday.

Mr. POE: I move that all that testimony with reference to Mrs. Boss be stricken out.

188 The COURT: Yes; that may as well go out, because if they produce somebody else it will stand on a different basis.

Cross-examination.

By Mr. POE:

Q. I understood you to say that your mother's name was Elizabeth Maus. I suppose you mean Elizabeth K. Maus? A. Yes, sir.

Q. She is the Elizabeth K Maus who is mentioned in this will and who is to get a legacy of $5,00? A. Yes, sir.

Q. You also had a sister Carrie, I believe? A. I have two sisters and a brother.

Q. They are not mentioned in this will at all? A. No, sir.

Q. What relation was Mrs. Fenton, who is also mentioned in the will as a legatee to the extent of $5,00, to Louis Beyer, Jr.? A. Sister.

Q. And, of course, your first cousin? A. Yes, sir.

Q. You do not know anything about the employment of Mr. Brenman, I believe? A. No, sir.

Q. And I understood you to say that you never met Mr. Brennan to know him until, I think, the 30th of July—until after your aunt's death? A. I do not know that I said that.

Q. I believe you said you saw him at the house, but did not meet him until after—on the 30th of July when he read you the

189 will? A. No, sir.

Q. Was it not on the 30th? A. No, sir; the will was not opened until August.

Q. Did he not invite you to come to his office on the 30th of July, you and your first cousin? A. No, sir; it was on a Tuesday——

Q. I may have misunderstood you. I do not wish to misstate it. I have it on my notes that way. A. But he did not send for me until the Tuesday following, and that would bring it in August.

Q. Mr. Beyer knew the contents of the will before you did? A. The whole contents?

Q. Yes. A. No; I do not think he did. I think he only knew that the property was equally divided between him and me.

Q. What was it you said about the opening of the will? A. It was opened on a Tuesday, I think, following at Mr. Brennan's office, and Mr. Beyer and I were present.

Q. The Tuesday following the funeral?. A. I think that would be the Tuesday following the funeral.

Q. The funeral was on Tuesday, I think. Mrs. Beyer died on Sunday, you know; the funeral was on Tuesday. A. As nearly as I can recall.

The COURT: A week later than the funeral.

Mr. POE: One week later than the funeral. (To the witness:) Mr. Louis Beyer knew from Mr. Brennan what the contents were. Did he communicate them?

A. He certainly did; that the property was equally divided between us or I would not have made the deed.

190 Q. You say she made the will because she ascertained that her husband would not be her heir unless she made the will? A. Yes, sir.

Q. And that was her object in making this will? A. Yes, sir.

Q. You say that Dr. Smith suggested that he should be a witness to the will? A. Yes, sir; he did.

Q. You were asked with reference to a conversation that you had with your uncle about there being a will and you stated that you told him about it out on the porch? A. Yes, sir.

Q. So you did tell him? A. I did.

Q. You answered it, I did not that day. That was in contradiction of what Fanny Perry said? A. Yes, sir.

Q. But you did on some subsequent day, which happened to be the next? A. I did on Wednesday morning.

Q. Not on the day of the funeral? A. No, sir.

Q. Is Fanny Perry's statement as to that substantially correct except as to the time it occurred? A. Is it correct? My uncle Beyer and I were standing on the corner of the porch when I told him and my aunt.

Q. Your aunt, Mrs. Boss, you mean? A. Yes, sir.

Q. What did he say? Was he surprised? A. The first
191 thing that led me to tell him of the will was he said, Now this property will have to go into the orphans' court and there will be all that expense, and if she had made a will it would have been saved. I said "Uncle Beyer, there is a will." He asked me if I knew the contents of it and I told him no.

Q. You and your uncle Beyer and Louis Beyer did not live very happily together after this will was discovered? A. No, sir.

Q. And you had some disputes with reference to the property, I believe? A. Yes, sir.

Q. When did those disputes begin? A. When outside influence began.

Q. Did they begin about the 31st of July? A. No, sir. After Uncle Beyer got the deed he was satisfied for quite a while.

Q. He was not satisfied before he got the deed? A. We gave it to him so quickly he did not have time to be dissatisfied.

Q. It was very unpleasant even for that one day? A. It was not for one day. He did not know that I had anything to do with it—did not know that I was in it.

Q. Did not know what? A. That I was mentioned in the will, and I did not know it myself.

Q. Did he know that your cousin, Louis Beyer, was? A. Did he know it?

Q. Yes. A. When I told him.

192 Q. How was it that Mr. Beyer, Sr., had made it so unpleasant for you in consequence of the will that you executed him this deed? A. His unpleasantness did not come in annoying me in any way, but he seemed to be hurt that he did not get the property. That is where the annoyance came in—to see him so much low-minded, because he was not left anything.

Q. Mrs. Johnson, I believe you have taken a quitclaim from your mother for her interest? A. I have.

Q. I suppose you have paid these other legacies? A. I do not understand your question.

Q. I say I suppose you and Mr. Louis Beyer, Jr., have paid these other legacies? A. What are they?

Q. There is a legacy of $5.00 to Mrs. Lefevre and Mrs. Fenton? A. Oh, Mr. Beyer was the administrator; I had nothing to do with that.

Q. You do not know whether they were paid or not? A. You ask Mr. Beyer.

Q. She talked to you about making a will in May? A. Yes, sir.

Q. And that, as I understand your language to be, was when Louis was raising the money on a mortgage? A. Not raising money on a mortgage, but getting money to pay the mortgage.

Q. To take up one mortgage? A. Making a new mortgage to take up another.

Q. He was negotiating that business for your aunt? A. Yes, sir.

193 Q. Was that in consequence of her ill health? A. No, sir; that was for the houses on H street. After Louis got into the real-estate business he attended to the business, paid taxes and everything.

Q. You said that you lived in the house ever since your infancy, almost? A. Yes, sir.

Q. You married Mr. Atley Johnson, I believe? A. Yes, sir.

Q. And you and he have how many children? A. We have three.

Q. The oldest is how old? A. Will soon be 16.

Q. He was under 13 when this will was made? A. About 12.

Q. Did you happen to know where the money came from which Mrs. Beyer had and with which this property was bought?

Mr. RIDOUT: I do not know that that will throw any light.

The COURT: It might. It is proper to ascertain from what source the property came.

The WITNESS: I understood from Mrs. Beyer.

Mr. MACKEY: To ascertain where the money came from that bought this house—that does not enlighten any issue in this case.

The COURT: It might. It is a circumstance which the jury might consider.

Mr. MACKEY: We take an exception.

(By Mr. POE:)

Q. Answer the question. A. The money was made in business.

Q. Together, or was it Mrs. Beyer's business? A. They lived together.

194 Q. Was the business Mrs. or Mr. Beyer's? A. I do not say about that.

Q. Do you know anything about any funds that he received as a pension? A. I know that Mr. Beyer received a pension.

Q. How much was that? A. I do not know that.

Q. Was it not quite a large sum? A. You will have to ask him. I do not know.

Q. You heard him say that he received it? A. I heard him say so. I never saw the money, but I heard him say so.

Q. Did you hear Mrs. Beyer say so? A. Did I?

Q. Yes. A. No, sir.

Q. Do you happen to know what was the cost of building this house on Brightwood avenue? A. No, sir.

Q. About how much did it cost? A. Mr. Beyer attended to that himself—Mr. Beyer, Sr. I was a school girl then. He paid all the bills.

Q. You are sure that on the 31st of July, 1896, Mr. Beyer, Sr., was dissatisfied with the contents of this will? A. I cannot say that he was dissatisfied with the contents, for he did not know them.

Q. And neither did you? A. No, sir.

Q. Why was it that he made things so unpleasant at that time? A. Because there was a will.

195 Q. He had not been consulted about the will at all, had he? A. No, sir.

Q. He was not present at the execution of either of them? A. None of us were.

Q. He was not in the house, was he? A. No, sir.

Q. You were, were you not? A. I was there.

Q. Was not Louis Beyer present on the occasion of the execution of the will, on Sunday—not in the room, but in the house? A. He was in the house.

Q. He was not on the outside, was he? A. No, sir.

Mr. WOLF: On behalf of Cohen & Wolf, trustees, I desire to offer this deed from Mr. Beyer to us to secure a trust. That is our connection with the case.

Mr. POE: I do not see that that sheds any light on it.

The COURT: What does that deed to you have to do with it?

Mr. WOLF: It shows that we are made parties to this suit.

Mr. RIDOUT: They are defendants in the equity suit.

The COURT: The object of that equity suit is to declare this will void.

Mr. POE: And, of course, that mortgage would fail.

The COURT: Are they brought here in these issues?

Mr. POE: Yes.

196 The COURT: Inasmuch as they are parties, I think the deed may come in showing why they are here. Of course it has no bearing upon the issue. I should doubt whether Wolf & Cohen should have been made parties to these issues. It is not necessary to bring them here as parties.

Mr. WOLF: I want it to go in for the same reason as the deed offered by the other side. If it goes in for one purpose it is in for all purposes.

The COURT: No. That is the only purpose for which that deed can go in evidence.

Have you any rebuttal, Mr. Poe?

Mr. POE: Nothing, except that which your honor reserved in reference to the caveat. That is not directly rebuttal. That was in reference to the right to offer in evidence the caveat. We do not want to press that very strongly on the court. I have not looked at the authorities except a little.

The COURT: I did last night. I wanted to see what the evidence would show the relations were between these parties, and I am inclined to think it is not admissible, and I am inclined to think also that I shall instruct the jury in the end to disregard the evidence that was admitted yesterday in reference to the admissions of Louis Beyer, Sr.

I think the legal way is to reject your offer of that caveat, and also to rule out the evidence of the declarations of Louis Beyer, Sr., upon the point of the incapacity of his wife to make this will, and of the undue influence.

Mr. POE: The exceptions will go to it.

The COURT: Yes; it is well to save your exception to my overruling your offer, and also the exception to refusing to admit. Is that all?

Mr. POE: That is all.

197 The following prayers were offered by the caveators and caveatees respectively, which were acted upon by the court as indicated at the foot of each:

Prayers for Caveators.

1. Unless the jury believe that at the time of the execution of the paper-writing purporting to be her last will Mary Beyer, the testatrix, fully understood the nature of the business in which she was engaged, and had sufficient capacity to make a disposition of her

estate with judgment and understanding in reference to the amount and situation of her property and the relative claims of different persons who were or should have been the objects of her bounty, and understood the manner in which she disposed of it, then she had not sufficient mental capacity to make a valid last will, and the verdict must be for the plaintiff on the first issue. The provisions of said paper may be considered by the jury in deciding the question of mental capacity of the testatrix to make a valid last will, and if the jury should believe that the said paper in its provisions is unjust or injudicious, that is a fact to be considered with the rest of the evidence, but is not of itself sufficient ground for finding that the testatrix had not sufficient capacity to make a valid will.

2. A testatrix should enjoy full liberty and freedom in the making of her will, and possess the power to withstand all contradiction and control. The degree of importunity or undue influence which deprives the testator of his free agency, which is such as he is too weak to resist, and renders the instrument not his free and unconstrained act, is sufficient to invalidate it, not in relation to the person alone by whom it is procured, but as to all others who are
198 so intended to be benefited by his undue influence.

3. Undue influence which will avoid a will means unlawful influence. All influence which may be used to induce a person to make a will in a given way is not unlawful. It is not unlawful for any person to suggest to the testatrix to make a will in a particular way, in favor of the person or persons so suggesting, or any other, and to present arguments and reasons giving support to such suggestion. Such suggestion and argument addressed to the judgment and reasons of the testatrix for the purpose of influencing her as to the propriety thereof are not unlawful, and therefore not undue, although they may have the effect of influencing her to make a will different from what she otherwise would have made, so long as the will is the direct act of her own deliberate judgment. Influence to be undue, and therefore unlawful, is that degree of importunity which overcomes and destroys the judgment and will of the testatrix and induces her to make a will she did not desire to make, in order to rid herself of such importunities.

Undue influence is a relative term. The degree of influence or importunity which might be undue and unlawful in one case might not be in another. It may depend in some degree upon the character and condition of the testatrix's mind in the particular case. It might require a much greater degree of importunity or influence to overcome one mind than another, even when each is in a healthy condition. It may require more to overcome the same mind when in a perfectly healthy and strong condition than when it is somewhat weakened by age, disease, or other cause.

In considering the issue of undue influence in this case it will be proper for you to consider the character and condition of Mary Beyer's mind at the time of making the alleged will; whether it was, as you may find it from the evidence, firm and strong
199 and not likely to be readily influenced by others, or whether weak and vacillating and susceptible to be readily controlled

by others; and the character of the influence, if any, that was exercised over her in relation to the making of her will and to the acts and circumstances in relation thereto shown in evidence; and if you shall find from all the evidence that she was induced to make a will by importunities of any person or persons, of such character that they overcame her will and induced her to execute a paper called a will contrary to her judgment and desire, you should answer that issue in the affirmative; but if you shall find from the evidence that the said paper was in accordance with her judgment and desire, although such judgment and desire may have been formed in pursuance of reasonable and moderate suggestions made to her by others, you should answer that issue in the negative.

4. The plaintiff prays the court to instruct the jury that undue influence can generally be established by circumstantial testimony only.

Prayers of Caveatees.

1. If the jury believe, in answer to the second question propounded, that the testatrix, Mary A. Beyer, executed the alleged will in all its provisions of her own free will and volition, so that it expresses her own wishes and intention, and that she was not restrained or coerced of others, in making her will, to act against her own desire and intention as regards the disposition of the property or any part of it, then they will answer the said second question No. (Granted.)

2. The burden of proof is upon the contestants to show that the making of the will was obtained by undue influence, and in order to establish that fact it must appear to the satisfaction of the
200 jury, by a preponderance of the evidence, that undue influence was employed; and to constitute undue influence it must appear to be such influence or restraint as caused the execution of the will by the decedent against her own preference or desire in the matter. Mere advice or persuasion to induce a testatrix to make a will or influence the disposition of her property by will is not undue influence. (Granted.)

3. That in this case, though the jury may believe from the evidence that the said Louis Beyer, Jr., or Mrs. Helen Johnson or either of them did use arguments and importunities to influence the deceased in the making of the will in question, still this fact will not affect the validity of the will if the jury further believe from the evidence that such arguments and importunities, if any were made, did not deprive the deceased of her free agency or prevent her from doing as she pleased with her property, even though the will might not have been made in all its provisions as it is but for such arguments and persuasion. (Granted.)

4. That in determining the question of undue influence the jury have the right and it is their duty to take into consideration the provisions of the will itself, in connection with all the other evidence in the case bearing upon the question whether the testatrix was coerced by threats or otherwise into making the will in question, or whether she in her lifetime, of her own will and volition, made and

executed the said will so that it expresses her own wishes and intentions. (Granted.)

Counsel for the respective parties having argued on the facts and the law of the whole case——

The COURT: Gentlemen of the jury, your duty in this case involves your making answer to three interrogatories. The
201 first one reads this way:

"First. Was the said Mary Beyer at the time of the alleged execution of the paper-writing bearing date the 14th day of July, A. D. 1896, and purporting to be her last will and testament, of sound and disposing mind, memory, and understanding, and capable of executing a valid deed or contract?"

The second one reads:

"Was the execution of the said paper-writing bearing date the 14th day of July, 1896, purporting to be the last will and testament of the said Mary Beyer, procured by fraud, circumvention, or undue influence practiced or exercised upon the said Mary Beyer by Louis Beyer, Jr., Helen B. Johnson, or by either of them or by any other persons?"

And the third interrogatory reads in this way:

"Were the contents of the paper-writing bearing date July 14th, 1896, and purporting to be the last will and testament of the said Mary Beyer, known to her at the time of the alleged execution thereof?"

You will notice that the first relates to the question of the condition of Mary Beyer's mind on the 14th day of July, 1896, when this paper-writing, said to be a will, was executed by her, and the second relates to the question of whether she was induced to execute that paper by fraud or undue influence of Louis Beyer, Jr., or Helen B. Johnson or any other person or by them and some other persons combined. The third relates to the question of whether at the time she signed the paper she knew and understood the contents of it.

You will observe that there is no question raised as to the fact that she did sign the paper. That is admitted.

Now, upon the first interrogatory, indeed upon all of them, the important time to which your mind should be directed is
202 the 14th day of July, 1896, the day on which the paper was executed. You are to determine the state of Mary Beyer's mind on that day. You are to determine whether undue influence was used on that day, not on some other day. You are to determine whether she knew the contents of that will on that day. In other words, that is the date to which your mind should be directed in its final conclusion, but you are not confined to that date in considering the evidence. It is proper and right that you should consider the state of her mind both before and after the time she executed this paper. In order to determine what the state of her mind was on that day it is also proper that you should consider whether undue influence was used prior to that day, in order to determine whether

it was used on the day and at the time the will was executed. You are therefore to consider all the evidence that you have—all the acts and transactions and circumstances proved in the case—regardless of the time they occurred, but you are to consider them as bearing upon and pointing to the particular day or date to which your inquiry relates, the 14th day of July, 1896.

To illustrate what I mean by that, if you should find that a few days after this will was executed this woman was incompetent to make it, that alone would not justify you in finding that she was incompetent on the 14th day of July, 1896; but the fact that she was incompetent a few days afterward, taken together with other evidence, might satisfy your mind that she was incompetent on that day. But if she was incompetent the very next day, but was competent on the 14th, then you should find her competent; and so with regard to undue influence. If you should find from the evidence that undue influence was exerted over her a day or two days or a week or at any other time prior to the execution of this paper,
203 that alone would not justify you in finding that on the 14th day of July, 1896, she executed the will under the operation of undue influence; but if you should find that undue influence existed prior to that day that would be a circumstance to consider whether it did or did not exist on the 14th day of July, 1896, and the fact, if you should find it to be a fact, that it did exist prior, taken together with other facts and circumstances in the case, might satisfy you that it did exist on the 14th of July, 1896, so that the question you will put to yourselves in relation to it is, was she competent on the 14th day of July, 1896? Was undue influence exercised over her to procure this will when it was made on the 14th day of July, 1896? That is the real question that you are to determine; but, as I have said before, you are entitled to and should consider all the evidence, facts, and circumstances of whatever date relating to that subject and focus it, so to speak, upon that particular date.

The principles of law that are to govern you in determining these questions are well settled. You will notice that there is no controversy among counsel as to what they are, only the particular language in which the principles shall be couched, and I have granted instructions prepared by the counsel for each side covering pretty much all the law of the case. I now read you one relating to the question of mental capacity to make a will, which instruction was prepared by the counsel for the complainant, the parties assailing the will, and it is in this language:

"Unless the jury believe that at the time of the execution of the paper-writing purporting to be her last will Mary Beyer, the testatrix, fully understood the nature of the business in which she
204 was engaged and had sufficient capacity to make a disposition of her estate with judgment and understanding in reference to the amount and situation of her property and the relative claims of different persons who were or should have been the objects of her bounty, and understood the manner in which she disposed of it, then she had not sufficient mental capacity to make a valid last will, and the verdict must be for the plaintiff on the first issue."

That part of the instruction defines as nearly as language can the condition or strength of mind that enables a person to make a will. A law of this District says that a person to make a will must have the same capacity that is necessary to make a valid deed or contract—that is to say, the party must have mind enough to grasp the subject-matter of the thing to be contracted about, to determine for themselves what sort of contract they want to make; as applied to a will, what sort of disposition they desire to make of the property. They must have strength of mind enough to be able to recollect their relations, if they have any, who they are, what their relations to them in life have been, and what expectations they might reasonably have or receive from them, and to determine for themselves what disposition they desire to make of their property. A person having that condition of mind is capable of making a will; but it must come up to that standard in order to be capable, and unless this testatrix at the time she executed this paper had sufficient mental capacity to remember or know who her relatives were, her friends were, what property she had, the extent of it and situation of it, and form in her own mind a conclusion as to the disposition she desires to make of it, then she is not competent to make a will. If she did have that degree of mental competency, she was competent. Everybody agrees that is the law. It is for you to consider all the evidence in the case tending to bear upon her mental capacity at the time and to determine from it all whether in your judgment she had the mental capacity requisite to enable her to make a valid deed or contract, and therefore a valid will. If you find from the evidence that she had, you will answer that first interrogatory in the affirmative.

Mr. POE: No.

The COURT: Yes. If you find that she had sufficient mental capacity to make a will at the time she signed this document, then you will answer the first interrogatory in the affirmative; but if you find that she had not sufficient mental capacity to make a will, then you will answer it in the negative. That disposes of that issue.

But there is another clause or paragraph to this instruction that bears upon this question of evidence, and I will now read that to you:

"The provisions of said paper may be considered by the jury in deciding the question of mental capacity of the testatrix to make a valid last will, and if the jury should believe that the said paper in its provisions is unjust or injudicious, that is a fact to be considered with the rest of the evidence, but is not of itself sufficient ground for finding that the testatrix had not sufficient capacity to make a valid will."

In other words, gentlemen, upon that question of mental capacity of a person you have, as you do upon many and most questions, two classes of evidence: You have, first, the direct evidence of the witness in relation to her mental capacity, giving their opinions as to her mental capacity; you heard several; I do not know how many; it is immaterial, so far as I am concerned; it may be for you to de-

termine; but several witnesses who had more or less oppor-
206 tunities to observe her have given you their opinions, together with their reasons upon which they base those opinions, as to the mental capacity of Mrs. Beyer at the time she made this will; that is proper evidence for you to consider; but their opinions are not binding upon you, because if they were you would have to find both ways here. They are not binding upon you, nor is the opinion of any particular witness. The good of those opinions is and the weight you should give them depends very largely upon the opportunities that each witness had to observe this woman and form an opinion about her mental capacity; but it does not depend altogether upon that. Much sometimes depends upon the intelligence of the witnesses, their capacity in observing a person's actions and hearing their conversation. Sometimes, I say, much depends upon the capacity of the witness to form an accurate opinion; so that you have to take all those things into consideration, and sometimes there is bias. I do not know that any of the witnesses who gave their opinions here were biased, but sometimes they are and you have to look at them well. Such opinions you are to consider and give them such weight as you see fit; and then the condition of health and all that is to be taken into consideration, bearing in mind that a person may be very ill and yet have sufficient mental capacity to make a will, but most kinds of diseases affect, especially in the last stages, the mind more or less, and it is a question for you whether the disease in this woman had progressed so far as to affect her mind, and, if so, to what extent, and together with other things her mind had become so weakened at the time she made this will as to render her incapable of making one, and the circumstance that this last instruction refers to is the contents of this paper itself. It says you
207 may consider the contents as bearing upon this mental capacity. Take a person whom you know well; you know his relatives; you heard him talking about making his will; you know what his intentions are as to the disposition of his property and all that, and he dies suddenly, and a will turns up very different from what you would have expected from that person. There is a circumstance that would have a tendency to show that something was wrong, either that person was not in his right mind, the mind had weakened, or something had happened. That is what this means here. The evidence here shows you to a certain extent the life and relations of this woman. You will be able to form, possibly, an opinion as to the kind of will you would have expected from her. I do not mean by that the kind of will you would have made for her if you were going to make one, but learning of her condition in life and her property you will be able to form, possibly, an opinion. I do not say you will as to what sort of will you would expect from her. If you come to look at this will and its contents and find it to be different from what you would have expected from such a woman in her condition in life, why, that is a circumstance that bears upon the question of mental capacity, bears unfavorably, but, on the contrary, if the will, when you come to look into it, is natural, what

you would have expected from her, why, then, it is still a circumstance, but it is a circumstance in favor of mental capacity instead of against it. That is what that instruction means.

We pass from the question of mental capacity to the one of undue influence, and upon that question I will first read you an instruction prepared by the counsel for the complainants, the parties assailing the will. It reads in this way:

208 "A testatrix should enjoy full liberty and freedom in the making of her will and possess the power to withstand all contradiction and control. The degree of importunity or undue influence which deprives the testator of his free agency which is such as he is too weak to resist and renders the instrument not his free and unconstrained act is sufficient to invalidate it, not in relation to the person alone by whom it is procured, but as to all others who are so intended to be benefited by his undue influence."

The latter part of that means if one person uses undue influence in obtaining the will, it will invalidate the will not alone in relation to that person, but to other persons who would be benefited by it, although they might be innocent persons.

I now read you some instructions upon the question of undue influence prepared by the counsel for the defendants—that is, those claiming under the will. The first one reads in this way:

"If the jury believe in answer to the second question propounded"—

That is, the one of undue influence—

"that the testatrix, Mary Beyer, executed the alleged will in all its provision- of her own free will and volition, so that it expresses her own wishes and intentions, and that she was not restrained or coerced of others, in making her will, to act against her own desire and intention as regards the disposition of the property or any part of it, then they will answer the said second question, No."

The second prayer for the defendants reads in this way:

"The burden of proof is upon the contestants"—

That is, complainants—

209 "to show that the making of the will was obtained by undue influence, and in order to establish that fact it must appear to the satisfaction of the jury, by a preponderance of the evidence, that undue influence was employed, and to constitute undue influence it must appear to be such influence or restraint as caused the execution of the will by the decedent against her own preference or desire in the matter. Mere advice or persuasion to induce a testator to make a will or influence the disposition of her property by will is not undue influence."

The third one on behalf of the defendants reads this way:

"That in this case, though the jury may believe from the evidence that said Louis Beyer, Jr., or Mrs. Helen Johnson, or either of them, did use arguments and importunities to influence the deceased in the making of the will in question, still this fact will not affect the validity of the will, if the jury further believe from the evidence that such arguments and importunities, if any were made, did not deprive

the deceased of her free agency or prevent her from doing as she pleased with her property, even though the will might not have been made in all its provisions as it is but for such argument and persuasion."

The fourth one on behalf of the defense is in this language:

"That in determining the question of undue influence the jury have the right, and it is their duty, to take into consideration the provisions of the will itself, in connection with all the other evidence in the case bearing upon the question whether the testatrix was coerced by threats or otherwise into making the will in question, or whether she in her lifetime of her own will and volition made
210 and executed the said will so that it expresses her own wishes and intentions."

There you see that fourth instruction relates to the question of evidence and authorizes, permits, and requires you to consider the contents of the will as a circumstance bearing upon the question whether undue influence was used or not, and what I said in relation to the question of mental capacity applies here, and I need not repeat it.

There is another instruction upon this same question of undue influence prepared by counsel for complainants, which I now read you. It is substantially a repetition of what I have already given you, but in different language. I think, perhaps, it is well enough to read it, that you may, each one of you, understand the definition of the term undue influence:

"Undue influence which will avoid a will means unlawful influence. All influence which may be used to induce a person to make a will in a given way is not unlawful. It is not unlawful for any person to suggest to the testatrix to make a will in a particular way in favor of the person or persons so suggesting or any other, and to present arguments and reason giving support to such suggestions. Such suggestion and argument addressed to the judgment and reason of the testatrix for the purpose of influencing her as to the propriety thereof are not unlawful, and therefore not undue, although they may have the effect of influencing her to make a will different from what she otherwise would have made, so long as the will is the direct act of her own deliberate judgment. Influence to be undue, and therefore unlawful, is that degree of importunity which overcomes and destroyes the judgment and will of the testatrix and induces her to make a will she did not desire to make in order to rid herself of such importunities.

Undue influence is a relative term. The degree of influence
211 or importunity which might be undue and unlawful in one case might not be in another." It may depend, in some degree, upon the character and condition of the testatrix's mind in the particular case. It might require a much greater degree of importunity or influence to overcome one mind or another even when each is in a healthy condition. It may require more to overcome the same mind when in a perfectly healthy and strong condition than when it is somewhat weakened by age, disease, or other cause.

"In considering the issue of undue influence in this case it will

be proper for you to consider the condition of Mary Beyer's mind at the time of making the alleged will, whether it was, as you may find it from the evidence, firm and strong and not likely to be readily influenced by others, or whether weak and vacillating and susceptible to be readily controlled by others, and the character of the influence, if any, that was exercised over her in relation to the making of her will and to the acts and circumstances in relation thereto, shown in evidence, and if you shall find from all the evidence that she was induced to make a will by importunities of any person or persons of such character that they overcame her will and induced her to execute a paper called a will contrary to her judgment and desire, you should answer that issue in the affirmative."

That is the law on the question of undue influence.

"But if you shall find from the evidence that the said paper was in accordance with her judgment and desire, although such judgment and desire may have been formed in pursuance of reasonable and moderate suggestions made to her by others, you should answer that issue in the negative."

There is one more — upon the question of undue influence
212 asked by the counsel for the complainants, and it is—

"The jury are instructed that undue influence can generally be established by circumstantial testimony only."

There are sometimes cases where undue influence is used where you have direct proof of somebody who was present and heard and witnessed improper persuasions and all that; but it is rare that you find cases of that kind. Generally undue influence has to be proved by circumstances. One of the circumstances we have mentioned—that is, you find a will very different from what you expected it from a person. Do not misunderstand—not a will differently from what you would have made. That raises no presumption. In order to raise a presumption or to have a circumstance worth anything as evidence the will must be different from what you would have expected from a party, considering the history and condition in life and relation in life of that party and family. That is one circumstance. If this will is different from the one you would have expected from that woman, that is a circumstance. If, on the contrary, it is a will that you would have expected from her, that is another circumstance. You are to take that circumstance, with all the circumstances which the evidence establishes, to your mind and ask yourself the question whether on this 14th day of July, 1896, when this will was executed, the woman did it under the influence of improper persuasion, so that it was not her act and she did not want to do it, but was persuaded to do it for the purpose of getting rid of importunities.

Now, gentlemen, the third issue requires little or no attention, because if you should find on the first issue that she had not mental capacity to make the will, why you would have to answer
213 the third the same way—that is, that she did not know the contents of the will; so that the way in which you answer the first will dictate the way in which you should answer the third in-

terrogatory. If she had mental capacity enough to make the will and signed it, the law presumes that she knew its contents. There is nothing here to show to the contrary, so that the third interrogatory will need no separate consideration from you. You will answer the third in accordance with the way you answer the first. If you answer the first no, you answer the third no; if you answer the first yes, you answer the third yes. One follows the other.

This is an important case, and, like all others, the parties here are entitled to your deliberate and careful judgment upon the evidence in the case. You have noticed that there is more or less feeling; always is in cases of this kind. It is natural to look for it. Family difficulties over property generally engender feeling, and we who have to decide the question of whether it is a will or not ought not to imbibe any of that feeling from one side or the other, but ought to approach the question with candor and decide in accordance with the evidence. Of course, every person has the right to make a will and to dispose of his or her property according to his or her notions. Whether that will agrees with your notions or mine is not the question. We have to try it all. We have to try the question of whether they did it—whether they had the capacity to do it or did do it, or whether they lacked the capacity and were induced to do it by somebody else. That is the question.

I do not know of anything else.

In returning your verdict you write after each one of the interrogatories "yes" or "no," in accordance with your judgment.
214 That is what you have to do. Elect a foreman when you go out, and then proceed with your deliberations. When you shall have arrived at a verdict let your foreman write after each one of these interrogatories as you may find.

Mr. RIDOUT: Are they entitled to take the will with them?

The COURT: I should say not without consent.

Mr. POE: Are they entitled to the granted instructions?

The COURT: That never has been done here, and I should hesitate to do it unless by consent.

Mr. POE: I would prefer that they should have the instructions.

Mr. RIDOUT: I object to it, and I do it in the interest of the jury.

The COURT: It seems to me that the jury should remember the instructions as to the law without reading them. As it has not been the habit to do it here, I would rather not do it.

Mr. MACKEY: Judge James held in the case of General Sherman that the prayers could not be sent out.

Mr. POE: It can be done by consent, and I would prefer that it be done.

The COURT: If they have any difficulty they can return in the court.

The jury retired, and, after an hour spent in deliberation, returned to the court-room for further instructions.

The CLERK: Gentlemen of the jury, have you agreed upon a verdict?

The FOREMAN (Mr. PINCHBACK): No. Your honor, a controversy has arisen among the jurymen as to the effect of the instructions of the court relative to undue unfluence. We ask that you give us fuller instructions on that point.

In order that you may understand the difficulty that we
215 labor under, I will say that some of the jurymen have the impression that the importunities of Louis Beyer, Jr., and Mrs. Helen Johnson, if made either affectionately or by persistence, are undue influence. There are some who think that that was not undue influence, and on that point we are at outs, and we desire to have further information from you upon that point.

The COURT: If the will was brought about by the influence of affection of Mrs. Beyer for her nephew and niece—if she made the will in their favor because of her affection for them, although they may have persistently cultivated her affection, that would not be undue influence. But if the will was brought about by their persistent importunities upon her to make a will in their favor—if they were so continuous and earnest and annoying that she, in her condition, yielded to them and made a will as they desired it, in order to get rid of their importunities, a will different from what she wanted to make, then it was undue influence. I do not know that that is an answer to your question, but I come as near to it as I can.

The FOREMAN: I think that is the information we desire. We will retire.

The COURT: When you return, the officer will take you to the court-room on the other side of the hall.

The jury retired.

After an absence of an hour, the jury returned to the court-room.

The CLERK: Gentlemen of the jury, have you agreed upon a verdict?

The FOREMAN (Mr. PINCHBACK): No, your honor. After a very deliberate consideration of the subject referred to us by these interrogatories I find the jury divided, hopelessly so.

The COURT: Not so now. Some twelve men are to decide
216 this case. I do not believe we could get twelve better men in the District of Columbia to decide it than you are.

The FOREMAN: If you will permit me to say, that is the difficulty; we have apparently twelve intelligent and self-willed men.

The COURT: Yes; do not yield your conscientious conviction; but there is a right and a wrong—I mean the evidence proves one or the other. See what the fact is and decide it, and when you shall have arrived at a verdict write the answers there, no or yes, as the case may be, to each one of the interrogatories and then turn the paper over and let each juror write his name on the back of it. Then put it in an envelope, let the foreman take it and keep it until Monday morning at 10 o'clock, and then bring it into court. You will remain in your room and not separate until you shall have decided the case, written the answers to the interrogatories, and signed your name on the paper. So soon as you shall have done that, then you will be at liberty to separate and go to your homes.

The FOREMAN: I understand by that that we must agree, yes or no, unanimously on each proposition?

The COURT: Yes or no, unanimously on each of the interrogatories, and as an evidence that each once has assented to the answer he is to write his name on the back of the paper. Then the foreman will take that paper and put it in an envelope, seal it, and keep it in his possession and let nobody see it or handle it until Monday morning at 10 o'clock. Stay in your room. There is a more convenient and comfortable one upstairs, where you can get more light. Take your time; there is no hurry; but do it as quickly as you can.

The FOREMAN: Your honor, I am sure you will keep us
217 until Monday morning.

The COURT: I am quite satisfied that you will be out of there by bedtime. When you come back Monday morning, instead of coming to this room go to criminal court No. one, on the south. We are to try a murder case there, because it is more convenient to the marshall to have it tried there than here. I ask you to come to that room. We will not trouble you to come back here Saturday morning.

The FOREMAN: We are not to leave the room until after we have reached a conclusion?

The COURT: You are not to separate, except that one of you may want to go out. If any of you want a lunch, let the messenger know and he will send out and get it.

The jury retired, and, the court having adjourned, a sealed verdict was handed in on Monday following.

In the Supreme Court of the District of Columbia.

LE FEVRE vs. BEYER. } Equity. No. 20324.

On issues to the circuit court.

I, Robert S. Boswell, being duly sworn, depose and say that I was employed by all the parties to this cause, through their respective attorneys, to take down stenographically the testimony and proceedings had on the trial of the issues sent by the court, sitting in equity, for trial by jury in the circuit court; that I accordingly attended said trial and took down the testimony and proceedings aforesaid stenographically and afterward reduced the same to typewriting, and that the annexed 196 pages constitute the same and are a true, correct, and full report thereon.

218 I further depose that I am in no way interested in the result of this cause.

ROBERT S. BOSWELL.

Signed and sworn to before me this 26th day of February, A. D. 1900.

ALBERT HARPER,
Notary Public.

[SEAL.]

Answer of Helen C. Fenton to Bill, &c.

Filed Mar. 30, 1900.

In the Supreme Court of the District of Columbia.

CAROLINE LE FEVRE
vs.
LOUIS BEYER ET AL. } No. 20324. Equity.

To the honorable the justice of said court:

The separate answer of Helen C. Fenton to the bill of complaint herein and to the petition by which she is made a party defendant to this cause respectfully shows:

1. That this defendant admits the allegation of the first paragraph of said bill to be true.

2. That this defendant admits the allegations of the second paragraph of said bill to be true.

3. That this defendant has no personal knowledge of the allegations of the third paragraph of said bill, and can therefor- neither admit or deny the same.

219 4. That neither can this defendant admit or deny the allegations of the fourth paragraph of said bill, she not having any personal knowledge concerning the matters therein alleged.

5. That this defendant admits the allegations of the fifth paragraph of said bill to be true.

6. That this defendant admits the allegations of the sixth paragraph of said bill to be true, excepting this, that this defendant is also one of the heirs-at-law and next of kin of the decedent, Mary Beyer, and as such is also a distributee of the estate of said deceased, although not so mentioned in said paragraph.

7. That this defendant believes the allegations of the seventh paragraph of said bill to be true.

8. That this defendant, not having any personal knowledge concerning the allegations of the eighth paragraph of said bill, can neither admit or deay the same, although she has been informed, and believes it is the fact, that the will mentioned in said paragraph was set aside by a jury sworn to try certain issues framed thereon.

9. That this defendant believes the allegations of the ninth paragraph of said bill to be true.

10. That this defendant, having no personal knowledge upon the matters set out in the tenth paragraph of said bill, can neither admit or deny same.

11. That this defendant admits the allegations of the eleventh paragraph of said bill to be true.

220 12. That this defendant is without knowledge of the matters alleged in paragraph twelve of said bill, and can accordingly neither admit or deny same, but she believes the estate of said deceased is of considerable value.

13. That, respecting the allegations of the thirteenth parapraph of said bill, this defendant submits the record will speak for itself thereon.

14. That this defendant, not having personal knowledge thereon, neither admits or denies the allegations of the fourteenth paragraph of said bill, but the record will, she is advised, attest the truth or falsity of said allegations.

15. That for an answer to the fifteenth paragraph of said bill this defendant refers to the answer above and asks that it be taken as her answer to this paragraph.

16. That respecting the allegations of the sixteenth paragraph of said bill, this defendant submits the record will attest the truth or falsity of said allegations.

Answering further, this defendant says that the will of the decedent, Mary Beyer, was set aside on or about the 11th day of December, A. D. 1879; that no appeal, according to the record, has been taken from said finding; that this defendant is therefore a distributee of the estate of said deceased, and that respecting her distributive interest therein this defendant submits her rights to the protection of the court for such decree as may be equitable and just in said premises.

HELEN C. FENTON.

ALEXANDER H. BELL,
Sol'r for Helen C. Fenton.

221 DISTRICT OF COLUMBIA, *ss:*

I, Helen C. Fenton, on oath depose and say that I have heard read the foregoing answer by me subscribed and know the contents thereof; that the facts stated therein upon my personal knowledge are true and those stated upon information and belief I believe to be true.

HELEN C. FENTON.

Subscribed and sworn to before me this 30th day of March, A. D. 1900.

J. R. YOUNG, *Clk,*
By R. J. MEIGS, JR., *Ass't Clk.*

Replication.

Filed Apr. 2, 1900.

In the Supreme Court of the District of Columbia, Holding an Equity Court.

CAROLINE LE FEVRE
vs.
LOUIS BEYER ET AL. } Equity. No. 20324.

The complainant joins issue on the answer of the defendant Helen C. Fenton.

CLAYTON E. EMIG,
Solicitor for the Complainant.

222 *Opinion of Court.*

Filed May 14, 1900.

In the Supreme Court of the District of Columbia.

CAROLINE LE FEVRE, Complainant,
vs.
LOUIS BEYER ET AL., Defendants. } No. 20324. Equity.

The bill in this case prays that the paper-writing bearing date July 14, 1896, and purporting to be the last will and testament of Mary Beyer, deceased, be decreed to be not her last will and testament. It also prays that a deed of trust placed on part of the property formerly owned by said decedent, by the defendant Louis Beyer, grantee of the devisees under said alleged will, be declared to be void, and that the trustees be enjoined from enforcing the same; also that a receiver be appointed to take charge of all the real estate of decedent pending this suit, and that the defendants in possession thereof under the said alleged will account for the rents and profits, and pay over the same to the receiver.

The complainant is the sister of said testatrix, and her other heirs and devisees are made parties to this suit.

The defendant Louis Beyer, who was the husband of said testatrix, filed a general demurrer to the bill, and other defendants filed answers.

These answers deny the charges of undue influence and want of testamentary capacity of said testatrix as made in the bill, and they also raise the question of jurisdiction by claiming that this court, sitting as an orphans' court, has exclusive jurisdiction to deter-
223 mine the validity of said will, and that complainant filed a caveat in said court to said will, which was there pending and undetermined, and claiming also that said complainant has a remedy by ejectment as to the real estate described in the bill if the will is invalid, and they ask the same benefit under their answers which they might have had by demurrers to the bill.

While the question of jurisdiction and other questions of law were so raised by demurrer and answers and were pending and undetermined in this cause, the parties, who are all of full age and competent to contract with each other, made and filed herein, signed by their solicitors respectively, the following stipulation:

"It is hereby stipulated by and between the parties to this cause, this 20th day of June, 1899, that the court may make an order certifying certain issues to be named in said order to be tried by a jury of the circuit court, and that the findings by said jury upon said issues shall be returned to this court, whereupon a decree shall be entered in accordance with said findings, all rights of appeal, as in cases of issues from the orphans' court, being hereby reserved."

On the same day this stipulation was filed the court, by a decree

reciting that the parties to this cause consented thereto, ordered three issues to be tried by a jury, and certified the same to the circuit court. These issues, in brief, were as follows:

1. Was said Mary Beyer of sound and disposing mind on July 14, 1896, when she executed said paper-writing?

2. Was the same procured by fraud, circumvention, or und-er influence, exercised by Louis Beyer, Jr., or Helen B. Johnson or any other person?

224 3. Were the contents of said paper-writing known to her when she executed the same?

As evidence of consent to this method of having a jury trial, the parties, by their solicitors, not only signed said stipulation, but they also signed a memorandum at the bottom of the order as follows:

"We assent to the passage of the above order."

A jury trial was had in December, 1899, and by its verdict the jury answered all the issues in the affirmative, thereby finding that while the testatrix was of sound and disposing mind and the contents of said paper-writing were known to her, still the execution of the same was procured by fraud, circumvention, or undue influence.

The justice presiding in the circuit court where the issues were tried, having refused to set aside the verdict and grant a new trial, the result of the trial there was certified to this court, and the complainant has asked for a decree in accordance with such verdict and under the said stipulation and record herein.

The cause has been fully argued, the defendants insisting that this court is without jurisdiction in the premises, and that the right to raise that question by their demurrer and answers is not waived by the agreement to said issues being certified to the jury and a jury trial had thereon, as stated.

And even if that question should be held against them, then that the verdict of the jury is only advisory to the court of equity, and, under the facts now returned to this court, with the verdict, being the whole testimony and proceedings in the circuit court, brought here by stipulation, the findings are unwarranted, and should not be considered in any decree to be made here.

225 It seems to me that the first point which the court should decide is that as to jurisdiction. Has the equity court in this District power to hear and determine whether a paper-writing purporting to be a last will and testament by which the title to real estate may be conveyed is or is not such last will and testament?

The bill was filed herein on April 7, 1899, and it is suggested that the act of June 8, 1898, gives exclusive jurisdiction to this court, holding a special term for orphans' court business, "to hear and determine all questions relating to the execution and to the validity of any and all wills devising any real estate within the District of Columbia."

The complainant contends that this court has jurisdiction, notwithstanding the said act to set aside or establish a will of real estate; and inasmuch as the character of the estate, as shown by the bill herein in this case, is equitable and not legal (the said testatrix having con-

veyed the same in trust to secure a debt still unpaid), that the complainant could not recover the same in an ejectment suit and must therefore of necessity come into a court of equity.

The defendants further contend that this court has no jurisdiction over the subject-matter of the suit in this case under the general principles of equity jurisprudence, and not having such, the parties cannot by stipulation confer jurisdiction.

12 Am. and Eng. Enc., 301, note 2.
12 Enc. of Pl. & Pr., 125, 129.

We must therefore inquire into the character of the case and see if it is one in its essential features of which a court of equity
226 can take cognizance. If the court can take jurisdiction of the subject-matter of the suit for any purpose, then the particular mode of procedure may be agreed upon by the parties, and the framing and sending of issues to a law court would be binding, although some other relief or other proceeding would have been in the usual course of practice.

If the case stated in the bill was only for probate of a will or to set aside an alleged will, I think, under the authorities in England and this country, the equity court would have no jurisdiction, the court having probate jurisdiction being authorized to determine the matter.

On this subject Judge Alvey, in delivering the opinion of the court in the case of Chase *v.* Winans, 59 Md., 480, used the following language:

"There has been no exception to the exercise of jurisdiction by a court of equity in this case. But it is proper for us to say, in order that this case may not be regarded as a precedent for the exercise of jurisdiction in such cases in the future, that it is no part of the ordinary jurisdiction of a court of equity to revise and correct the probate of wills. In regard to wills of real estate, if formally executed according to the requirements of the statute, unless it be in the cases of trusts or equitable estates or there be some legal impediment to the party's right to maintain an action of ejectment, such party must assert his right in an action at law."

If any person interested under this alleged will should offer the same for probate under section 8 of said act of June 8, 1898, as a will of real estate (which does not seem to have been done), the complainant as an heir-at-law would have an opportunity under the
227 other provisions of said act to contest its validity; but that act does not authorize the heir-at-law, who denies the existence or validity of a will, to take the initiative in setting up a pretended will in the orphans' court only to attack it. If there are good grounds for filing a bill in equity complainant would not be estopped from going into that court by having filed a caveat in the orphans' court when the paper was offered there as a will of personal property.

The complainant might find the deed of trust made by the testatrix as described in the bill a serious obstacle in the way of an ejectment suit, and that question cannot be so easily determined; and if it is an obstacle which would entitle her to come into a court

of equity to have removed, so that the question of "will or no will" could be fairly tried in an ejectment suit by a jury, then the stipulation to have such a trial by sending issues from this court in lieu of an ejectment suit ought to give the court authority for that method of procedure. This is clearly within the rulings in the case of Boyse *v.* Rossborough, 6 House of Lords Cases, 2. That was a suit in which an heir-at-law filed a bill in equity to impeach a will of real estate because of undue influence and fraud, and alleging that there was an outstanding term which was in the way of an action at law to try the title, and it was held that the court had a discretion to direct an issue *devisavit vel non* or to remove the obstacle to a suit at law, as it might think best.

There can be no doubt that the title to the property which the testatrix undertook to dispose of by this alleged will was and is an equitable title. If a judgment had been recovered against the owner in her lifetime an execution at law could not have been levied
228 upon it, but in order to subject it to the payment of the judgment a bill in equity would have been necessary.

Morsell *v.* First Nat'l Bank, 91 U. S., 357.

Being an equitable title, and the alleged will relating to it being obtained by fraud and undue influence, as is averred in the bill, could the truth of that averment be tried in an action at law to recover possession of said property?

An equitable title will not sustain a suit to recover land; the plaintiff must have the legal title.

Oaksmith *v.* Johnson, 92 U. S., 346.

Counsel for defendants argue, however, that under the provisions of the deed of trust which Mrs. Beyer placed on this property that she and her heirs and assigns were to be entitled to remain in possession until the sale of the property by the trustees for default in payment of the debt secured, and that if complainant is an heir and there are no assigns lawfully entitled to possession to the exclusion of the heirs that she would be entitled to the possession and could sue therefor.

I have doubts about the soundness of this argument, and on consideration of the whole case I am inclined to hold that the court of equity had such a case before it on the averments in this bill, if true, that it could grant equitable relief, and that if it has jurisdiction for any purpose, then it can grant full relief.

If counsel in an equity cause are of the opinion that a court of law is the proper forum for the trial of the controversy, they must, in fairness to the court and the opposite party, make the objection at the earliest opportunity.

229 Reynes *v.* Dumont, 130 U. S., 354.
Kilbourn *v.* Sunderland, *ib.*, 514.
Tyler *v.* Moses, 13 App. D. C., 428.

Of course, it is contended in this case that this objection was made in the demurrer and in the answers, and that therefore the point has been continually before the court.

The agreement to send issues to the jury and the appearance of parties and trial of those issues before the jury would seem to waive the objections previously made to that method of procedure, and might estop the parties from again returning to it if the verdict was unsatisfactory to them, even if the court's jurisdiction was doubtful. I need not, however, go that far in this case, for reasons already stated, and I hold that under the facts of this case it is too late for the defendants to be allowed to say that the manner chosen of having a jury trial to determine the question of will or no will is not lawful.

Strong *v.* Willey, 104 U. S., 512, 515.

The court having jurisdiction for some purpose, and the parties consenting to have the issues tried by a jury, and actually and earnestly trying the same, I think they must now be bound by such procedure, and that the only questions properly before the court at this time are:

First. Were said issues fairly tried? and

Second. Is the verdict one which this court can regard as equitable and proper?

There is no question about the power of the court of equity to direct a further trial by another jury if that course should seem proper or the chancellor may disregard the verdict entirely and pro-
230 ceed to hear and determine the cause without reference to it in a case where the issues were sent to the law court by the chancellor on his own motion, but where the parties have agreed that a decree shall be entered in accordance with the findings of the jury it may be doubtful if the parties can be heard or allowed to ask the court to disregard the verdict, unless some material error has been committed in the trial.

Looking at the case from every standpoint, I have reached the conclusion that the verdict was one which the evidence warranted the jury in finding; that the case was fairly presented to them by the justice presiding in the circuit court, and that there is no good reason shown for disturbing the said verdict.

There is some conflict in the evidence, and there are some inferences of fact which would support the verdict and which may fairly be drawn by a jury from the facts proven, and I cannot convince myself that any injustice has been done, either by the circuit court or the jury, in the conclusion reached. The witnesses were before them, and a motion for a new trial was argued and considered there, and the justice presiding was satisfied that the verdict was warranted by the evidence, otherwise he would have vacated it.

I will sign a decree in accordance with the prayers of the bill, the said stipulation of the parties, and the verdict of the jury.

JOB BARNARD, *Justice.*

231 *Decree and Reference to Auditor.*

Filed May 16, 1900.

In the Supreme Court of the District of Columbia.

CAROLINE LEFEVRE
vs.
LOUIS BEYER, JR., ET AL. } Equity. No. 20324.

This cause having come on to be heard by the court and having been argued by the solicitors for the respective parties, and the bill, answers, demurrers, exhibits, proofs, stipulations, and other proceedings having been read and considered by the court, it is thereupon, this 16th day of May, A. D. 1900, adjudged, ordered, and decreed by the court that the complainant herein is entitled to the relief prayed for in her bill of complaint.

And it is adjudged, ordered, and decreed that the paper-writing bearing date July 14th, 1896, and purporting to be a last will and testament of Mary Beyer, late of the city of Washington, District of Columbia, was not the last will and testament of the said Mary Beyer, deceased, but that the said Mary Beyer, deceased, died intestate as to real estate.

And it is adjudged, ordered, and decreed that the verdict of the jury upon issues certified out of this court as per stipulations of the solicitors of all the parties to this cause, being the heirs, next of kin, and distributees of the said Mary Beyer, deceased (which stipulation is part of the record of this cause and filed herein), whereby the said jury found that the said paper-writing purporting to be the last will and testament of said Mary Beyer, deceased, and bearing date the 14th day of July, A. D. 1896, was procured by the fraud, circumvention, or undue influence of one Louis Beyer, Jr.,
232 and Helen B. Johnson, or other person or persons, be, and the same is hereby, ratified, approved, and adopted as the judgment, decree, and conscience of this court.

And it is further adjudged, ordered, and decreed that the papers and proceedings in this cause be, and they hereby are, referred to the auditor of this court, to state an account between the party complainant and defendants herein of the rents, issues, and profits arising from the real estate in these proceedings mentioned or that reasonably and properly should have arisen thereout from the day of the date of the death of the said Mary Beyer up to and including the date of the decree in this cause.

And it is further adjudged, ordered, and decreed that the costs of the proceedings in this cause, both in this court and in the court to which the issues herein were certified to be tried by jury, be paid by the defendants herein, except the defendant Helen C. Fenton.

And it is further adjudged, ordered, and decreed that all questions arising between the parties to this cause as to the right to apply for a receiver or receivers or for the complainant to file a supplemental

bill for the purpose of having the real estate herein mentioned sold or divided in kind are hereby reserved until the further decree or order of this court.

And in stating the account herein directed the said auditor is authorized to take such further proof as may be deemed necessary and all questions are reserved until the coming in of his report.

By the court:

JOB BARNARD, *Justice.*

233 *Appeal.*

Supreme Court, District of Columbia.

CAROLINE LEFEVRE
vs.
LOUIS BEYER ET AL. } 20324.

The clerk will enter an appeal in this cause from decree of May 16, 1900, by Louis Beyer, Louis Beyer, Jr., in his own right and as executor, and Helen B. Johnson, and issue citation to Caroline Lefevre as appellee.

FRANKLIN H. MACKEY,
Sol. for Beyer, Sr.
JOHN RIDOUT,
For Appellants.

6, 2, 1900.

Appeal, as ordered, entered by cl'k, 1900, 6, 2.

Order Overruling Motion for Receiver.

Filed May 28, 1900.

In the Supreme Court of the District of Columbia.

CAROLINE LEFEVRE
vs.
LOUIS BEYER, SR., ET AL. } Equity. 20324.

This cause coming on to be heard upon the motion of the complainant for appointment of a receiver and having been
234 argued and submitted, it is this 26th day of May, 1900, ordered that said motion be, and it is hereby, overruled.

JOB BARNARD, *Justice.*

Order of Severance of Parties on Appeal.

Filed Jun- 2, 1900.

In the Supreme Court of the District of Columbia.

CAROLINE LEFEVRE
vs.
LOUIS BEYER ET AL. } In Equity. No. 20324.

The defendants, Louis Beyer, Sr., Louis Beyer, Jr., and Helen B. Johnson, having appealed from the decree in this cause, it is this 2d day of June, 1900, ordered that the said defendants have leave to sever on this appeal from the other defendants herein; that the bond on appeal to operate as a supercedeas be fixed in the penalty of one thousand dollars and the bond for costs only at one hundred dollars.

JOB BARNARD, *Justice.*

235 Supreme Court of the District of Columbia.

CAROLINE LE FEVRE
vs.
LOUIS BEYER, LOUIS BEYER, JUNIOR; HELEN B. Johnson, and Louis Beyer, Jr., Executor, &c. } No. 20324. In Equity.

The President of the United States to Caroline Le Fevre, Greeting:

You are hereby cited and admonished to be and appear at a Court of Appeals of the District of Columbia, upon the docketing the cause therein under and as directed by the rules of said court, pursuant to an appeal entered in the supreme court of the District of Columbia on the 2nd day of June, 1900, wherein Louis Beyer, Louis Beyer, Junior; Helen B. Johnson, and Louis Beyer, Junior, executor, are appellants and you are appellee, to show cause, if any there be, why the decree rendered against the said appellants should not be corrected and why speedy justice should not be done to the parties in that behalf.

Seal Supreme Court of the District of Columbia.

Witness the Honorable Edward F. Bingham, chief justice of the supreme court of the District of Columbia, this second day of June, in the year of our Lord one thousand nine hundred.

JOHN R. YOUNG, *Clerk.*

Service of the above citation accepted this 2nd day of June, 1900.

CHAS. POE,
Attorney for Appellee, Caroline Le Fevre.

236 *Memorandum.*

June 6, 1900.—Appeal bond filed.

237 Supreme Court of the District of Columbia.

UNITED STATES OF AMERICA, } ss:
District of Columbia, }

I, John R. Young, clerk of the supreme court of the District of Columbia, hereby certify the foregoing pages, numbered from 1 to 236, inclusive, to be a true and correct transcript of the record, as prescribed by rule 5 of the Court of Appeals of the District of Columbia, in cause No. 20324, equity, wherein Caroline Le Fevre is complainant and Louis Beyer *et al.* are defendants, as the same remains upon the files and of record in said court.

Seal Supreme Court of the District of Columbia.

In testimony whereof I hereunto subscribe my name and affix the seal of said court, at the city of Washington, this 13th day of July, A. D. 1900.

JOHN R. YOUNG, *Clerk.*

Endorsed on cover: District of Columbia supreme court. No. 1009. Louis Beyer *et al.*, appellants, *vs.* Caroline Le Fevre. Court of Appeals, District of Columbia. Filed Jul 19, 1900. Robert Willett, clerk.

ADDITION TO RECORD PER STIPULATION OF COUNSEL.

COURT OF APPEALS OF THE DISTRICT OF COLUMBIA.

OCTOBER TERM, 1900.

No. 1009.

LOUIS BEYER, LOUIS BEYER, JUNIOR; HELEN B. JOHNSON, AND LOUIS BEYER, JUNIOR, EXECUTOR, APPELLANTS,

vs.

CAROLINE LE FEVRE.

FILED SEPTEMBER 27, 1900.

Court of Appeals, District of Columbia, October Term, 1900.

LOUIS BEYER ET AL. *vs.* CAROLINE LE FEVRE. } No. 1009.

It is hereby stipulated and agreed that the following-described papers, to wit, the stipulation of counsel in equity cause 20324, Le Fevre *vs.* Beyer, filed therein June 20, 1899, and the order of court, filed in said cause on said 20th day of June, 1899, framing and certifying issues therein, and the consent of counsel thereto, ought to be a part of the record in this cause, but were inadvertently omitted therefrom; and it is further stipulated that the same shall form a part of the record herein and shall be printed by the clerk of this court as a part of this record.

FRANKLIN H. MACKEY,
Sol. for Louis Beyer, Sr.
CHAS. POE, *Sol'r for Appellee.*

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Stipulation for Trial by Jury.

Filed June 20, 1899.

In the Supreme Court of the District of Columbia.

LEFEVRE
vs.
BEYER ET AL. } Equity. No. 20324.

It is hereby stipulated by and between the parties to this cause this 20th day of June, 1899, that the court may make an order certifying certain issues, to be named in said order, to be tried by a jury of the circuit court, and that the findings by said jury upon said issues shall be returned to this court; whereupon a decree shall be entered in accordance with said findings, all rights of appeal as in cases of issues from the orphans' court being hereby reserved.

CLAYTON E. EMIG,
CHAS. POE, *Sol'rs for Compl't.*
JOHN RIDOUT,
For Louis Beyer, Jr., and Helen B. Johnson.
FRANKLIN H. MACKEY,
Sol. for Louis Beyer.
WOLF & COHEN,
Solicitors for Cohen and Wolf, Trustees.

Order Certifying Issues to Circuit Court.

Filed June 20, 1899.

In the Supreme Court of the District of Columbia, Holding an Equity Court.

CAROLINE LEFEVRE
vs.
LOUIS BEYER ET AL. } Equity. 20324.

Ordered by the court this 20th day of June, 1899 (the parties to this cause consenting hereto), that the following issues to be tried by a jury be, and they hereby are, certified to the circuit court, to wit:

First. Was the said Mary Beyer at the time of the alleged execution of the paper-writing bearing date the 14th day of July, A. D. 1896, and purporting to be her last will and testament, of sound and disposing mind, memory, and understanding and capable of executing a valid deed or contract?

Second. Was the execution of the said paper-writing bearing date the 14th day of July, 1896, and purporting to be the last will and testament of the said Mary Beyer, procured by fraud, circumvention, or undue influence practised or exercised upon the said Mary Beyer by Louis Beyer, Jr., Helen B. Johnson, or by either of them or by any other person?

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Third. Were the contents of the paper-writing bearing date July 14th, 1896, and purporting to be the last will and testament of said Mary Beyer, known to her at the time of the alleged execution thereof?

CHAS. C. COLE,
Asso. Justice.

We assent to the passage of the above order.

CHAS. POE,
CLAYTON E. EMIG,
Sol'rs for Compl't.
JOHN RIDOUT,
For Beyer, Jr., & Johnson.
FRANKLIN H. MACKEY,
Sol. for Louis Beyer.
WOLF & COHEN,
Solicitors for Trustees Cohen and Wolf.

[Endorsed:] No. 1009. Louis Beyer *et al.*, appellants, *vs.* Caroline Le Fevre. Addition to record per stipulation of counsel. Court of Appeals, District of Columbia. Filed Sep. 27, 1900. Robert Willett, clerk.

SECOND ADDITION TO RECORD PER STIPULATION OF COUNSEL.

COURT OF APPEALS OF THE DISTRICT OF COLUMBIA.

OCTOBER TERM, 1900.

No. 1009.

LOUIS BEYER, LOUIS BEYER, JUNIOR; HELEN B. JOHNSON, AND LOUIS BEYER, JUNIOR, EXECUTOR, APPELLANTS,

vs.

CAROLINE LE FEVRE.

FILED OCTOBER 11, 1900.

Motion for a New Trial.

Filed December 12, 1899.

In the Supreme Court of the District of Columbia.

LE FEVRE *vs.* BEYER ET AL. } At Law. No. 43492.

On issues from the equity court in Le Fevre *v.* Beyer *et al.*, equity, No. 20324.

Now comes the defendant Louis Beyer, Senior, and moves the court to set aside the verdict and grant him a new trial in the above-entitled cause on the following grounds:

1st. That the verdict on the 2nd issue was contrary to the evidence.

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2nd. That the said verdict on said issue was against the weight of the evidence.

3rd. That there was no evidence to support the finding of the jury as to the second issue.

4th. That the said verdict is unreasonable.

5th. That the said verdict is inconsistent with the verdict upon the 1st and 3rd issues.

6th. That the court erred in its rulings upon questions of law; which rulings were duly excepted to at the time they were made.

7th. Misconduct of the jury in the jury-room.

FRANKLIN H. MACKEY,
Attorney for said Defendant.

Chas. Poe, Esq., attorney for plaintiff:

Take notice that on Friday next, at the opening of the court or as soon thereafter as counsel can be heard, I will call up the above motion.

FRANKLIN H. MACKEY,
Att'y for Defendant Louis Beyer.

Supreme Court of the District of Columbia.

SATURDAY, *January* 6, 1900.

Session resumed pursuant to adjournment, Chief Justice Bingham presiding.

* * * * * * *

The following case was certified to criminal court No. 2, Justice Cole presiding:

CAROLINE LEFEVRE, Pl'ff,
v.
LOUIS BEYER ET AL., Def'ts. } At Law. No. 43492. Issues from Equity.

Upon hearing the motions of the defendants for a new trial, it is considered that said motions be, and they are hereby, overruled.

Memorandum.

1900, January 9.—Findings of jury certified to the equity court in accordance with the order of the trial court appearing on page 20 of the printed record.

In the Court of Appeals, District of Columbia, October Term, 1900.

LOUIS BEYER ET AL.
vs.
CAROLINE LE FEVRE. } Number 1009.

It is hereby stipulated by the parties hereto that the papers and proceedings of the supreme court of the District of Columbia enumerated and described below may be printed by the clerk of

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this court as part of the record herein, the same having been omitted from the transcript of record.

FRANKLIN H. MACKEY,
For Appellants.
CHAS. POE, *For Appellee.*

Memorandum of order of court certifying verdict of jury back to the equity side of the court; motion by Louis Beyer for new trial; order of court overruling motion for new trial.

[Endorsed:] No. 1009. Louis Beyer *et al.*, appellants, *vs.* Caroline Le Fevre. 2d addition to record per stipulation of counsel. Court of Appeals, District of Columbia. Filed Oct. 11, 1900. Robert Willett, clerk.

131 WEDNESDAY, *October* 17*th*, *A. D.* 1900.

LOUIS BEYER, LOUIS BEYER, JUNIOR, HELEN B. JOHNSON, and Louis Beyer, Junior, Executor, Appellants,
vs.
CAROLINE LE FEVRE. } No. 1009.

The argument in the above-entitled cause was commenced by Mr. John Ridout, attorney for the appellants, and was continued by Mr. Franklin H. Mackey, attorney for the appellants, and by Mr. Clayton E. Emig, attorney for the appellee.

THURSDAY, *October* 18*th*, *A. D.* 1900.

LOUIS BEYER, LOUIS BEYER, JUNIOR, HELEN B. JOHNSON, and Louis Beyer, Junior, Executor, Appellants,
vs.
CAROLINE LE FEVRE. } No. 1009.

The argument in the above-entitled cause was continued by Mr. Charles Poe, attorney for the appellee, and was concluded by Mr. Henry E. Davis, attorney for the appellants.

132 LOUIS BEYER, LOUIS BEYER, JUNIOR, HELEN B. Johnson, and Louis Beyer, Junior, Executor, Appellants,
vs.
CAROLINE LE FEVRE. } No. 1009.

Opinion.

Mr. Chief Justice ALVEY delivered the opinion of the court:

This appeal is from a decree of the supreme court of the District of Columbia, as a court of equity, declaring the paper purporting to be the last will and testament of Mary Beyer, deceased, null and void, as to the real estate of the deceased, and that said deceased died intestate as to her said real estate, according to the verdict of a jury found in the premises.

The bill was filed on April 7, 1899, by a sister of the deceased, and an heir-at-law, against the devisees in the paper purporting to be her last will and testament, the executor named therein, the surviving husband of the deceased, and against certain other parties holding conveyances conveying the legal title to the real estate of the deceased, and creating incumbrances thereon.

It appears from the allegations of the bill, and it is conceded to be the fact, that Mary Beyer, the deceased, died July 26, 1896, and that, on the 14th of that month, about two weeks prior to her death, she executed what purported to be her last will and testament. She was, at the time of her death, about sixty-five years of age, and had been, for a considerable period prior to her death, in a feeble state of health. She left surviving, her husband, Louis Beyer, and two sisters and the descendants of a deceased sister, as her heirs-at-

law; she never having had children of her own. Her estate consisted almost entirely of certain real estate situate in the city of Washington; her personal estate being very inconsiderable. Her interest in the real estate owned by her was of an equitable character merely, or an equity of redemption, with a reservation of the right of occupancy until default made in the payment of the debt for which the land and premises had been mortgaged, or conveyed in trust as security, or until sale made under the power in the conveyance. The deed of trust was made by Mary Beyer and her husband, Louis Beyer, on the 11th day of May, 1896, to Charles C. Glover and Myron M. Parker, as trustees, to secure the sum of $2,800, loaned to Mary Beyer, with interest, and all cost and expenses of executing the trust; the debt to become due three years after the date of the deed of trust. It is not claimed or pretended that any part of this debt so secured had been paid by Mary Beyer before her death, and it still remains unpaid; and the legal title or estate in the property remains vested in the trustees.

It is alleged by the bill, that Mary Beyer, the deceased, being in very feeble health, as we have already stated, was subject to such necessary treatment for her bodily ailments, and to the administration of drugs for her relief, that her mental faculties became greatly impaired, and to such an extent as to render her incapable of understanding the most ordinary affairs of life, or of knowing or appreciating the nature, character, value or extent of her estate, her right to exercise dominion over the same, the relatives whom she had, or the natural objects of her bounty, and wholly incapable of executing a valid deed or contract, and that this condition of mind and body existed for some time prior to her death, and was her condition down to the day of her death, and upon the date and at the time of the alleged execution of the paper purporting to be her will.

It is further alleged in the bill, that while the said Mary Beyer was so enfeebled and suffering, the defendants, Louis Beyer, Jr., an adopted son of the deceased, and Helen B. Johnson had a paper-writing prepared, purporting to be a last will and testament, under their direction and according to their instruction, by a lawyer of their own selection, whom the said Mary Beyer had never seen, and induced the said Mary Beyer to affix her name to the same while she was on her death-bed, and so feeble, both in mind and body, that she was unable to resist their importunities, and was not a free agent or able to form or express her wishes as to the disposition of her estate.

By the paper so prepared and signed, as it is alleged, the property of the deceased was disposed of in a way quite different from
133 and not in accordance with her real wishes and intent. That the entire estate and property of the deceased, with but small exception, was devised and bequeathed to the defendants, the said Louis Beyer, Jr., and Helen B. Johnson, and Louis Beyer, Jr., was constituted and appointed sole executor, without bond. That the terms and provisions of the paper so executed were concealed from the defendant, Louis Beyer, the surviving husband of the deceased,

by Louis Beyer, Jr., and Helen B. Johnson, until after the death of the said Mary Beyer, because, as it is alleged, they were afraid that he would protest against their unlawful schemes and thwart and prevent them; and they procured the signature to said paper-writing during his absence, which absence they had cunningly contrived to bring about.

It is then alleged, that the paper-writing that had been signed by said Mary Beyer was, on the 29th of August, 1896, submitted to the supreme court of this District, holding a special term for orphans' court business, by Louis Beyer, Jr., for probate, and that the same was then and there admitted to probate, and thereupon letters testamentary were issued to the said Louis Beyer, Jr., who at once qualified as executor. It is also alleged, that Louis Beyer, the surviving husband, filed a caveat to the probate of said paper; but in consideration of a conveyance, by Louis Beyer, Jr., and Helen B. Johnson, of a part of the real estate supposed to be devised to them by the paper admitted to probate, the said Louis Beyer caused his caveat to be withdrawn. It is also alleged, that, in consideration of a considerable sum of money paid by Louis Beyer, Jr., and Helen B. Johnson, Elizabeth K. Maus, a surviving sister of the deceased and one of her heirs-at-law, conveyed all her interest in and to the estate to said Louis Beyer, Jr., and Helen B. Johnson, by deed of quitclaim or release. It is further alleged, that Louis Beyer, the surviving husband, subsequent to the date of the deed to him by Louis Beyer, Jr., and Helen B. Johnson, made a deed of trust of the property so conveyed to him, to Adolph G. Wolf and Meyer Cohen, as trustees, to secure $2,000 loaned to him, and which is still due and owing.

The bill prays that the paper-writing purporting to be the last will and testament of Mary Beyer, deceased, be decreed and declared to be not her last will and testament, and that she died intestate; that the deed of trust made by Louis Beyer, the surviving husband, to Wolf and Cohen, trustees, be decreed to be null and void, and that said trustees be restrained from attempting to execute the trust created by the deed to them; that Louis Beyer, the surviving husband, Louis Beyer, Jr., and Helen B. Johnson, be decreed to account for rents and profits; that a receiver be appointed; and that the plaintiff may have such other and further relief as the nature and circumstances of the case may require.

The defendants, Louis Beyer, Jr., as devisee and executor, and Helen B. Johnson, answered the bill separately, though their answers set forth substantially the same state of facts. They deny that the deceased was incapable of making a valid will, and deny that the paper purporting to be the last will and testament of Mary Beyer, deceased, was obtained by any fraud or contrivance of theirs, or that they exerted any undue influence over the deceased, whereby she was induced to make her will. They aver and insist that the paper purporting to be the will of the deceased, was made and executed with full and entire understanding of its contents, and was the free and unconstrained expression of her feelings and intentions, and strictly in accordance with her own fixed intention as to the

manner of disposing of her property. They deny the jurisdiction of the court, and pray the benefit of a demurrer to the bill for that cause.

In the answer of Cohen and Wolf, trustees, they say they cannot admit or deny the material allegations of the bill, in respect to the circumstances under which the paper purporting to be the will of the deceased was executed. But they aver and insist that the plaintiff has not presented a case by her bill to entitle her to relief in a court of equity, and they pray the benefit of a demurrer to the bill for want of jurisdiction.

The defendant, Louis Beyer, the surviving husband, has demurred to the bill; thereby raising the question as to the jurisdiction of the court as a court of equity to take cognizance of the case, and to grant the relief as prayed.

At this stage of the case, and on the pleadings that we have stated, the parties, all being of full age and competent to act for themselves through their attorneys, came to an understanding or agreement as to the future proceedings in the cause; and, to carry out such agreement, they entered into the following stipulation:

"It is hereby stipulated by and between the parties to this cause, this 20th day of June, 1899, that the court may make an order certifying certain issues, to be named in said order, to be tried by a jury of the circuit court, and that the findings by said jury upon said issues shall be returned to this court; *whereupon a decree shall be entered in accordance with said findings;* all rights of appeal as in cases of issues from the orphans' court being hereby reserved." This stipulation was signed by the counsel for all the parties.

Upon the filing of this stipulation, and in pursuance thereof, the court passed an order formulating three issues to be tried by a jury; the order reciting the fact that the issues thus framed were made by the consent of the parties; and the issues so made were in substance the following:

1. Was said Mary Beyer of sound and disposing mind on July 14, 1896, when she executed said paper-writing?

2. Was the said paper-writing procured by fraud, circumvention, or undue influence, exercised by Louis Beyer, Jr., or Helen B. Johnson, or any other person?

3. Were the contents of said paper-writing known to her when she executed the same?

At the foot of the order directing these issues the parties, by their respective attorneys, signed the following memorandum of assent: "We assent to the passage of the above order."

The issues were transmitted to the circuit court for trial, and the trial took place in December, 1899; and after a protracted
134 and a hotly contested trial, a verdict was rendered, whereby the jury found on all the issues in the affirmative, thereby affirming that while the deceased was of sound and disposing mind, and knew the contents of the paper, yet the execution of the same was procured by fraud, circumvention, or undue influence.

It appears the defendants moved the court of law before which the trial took place for a new trial, but that was refused. Where-

upon the findings of the jury were certified to the court of equity; and with the verdict or findings, by stipulation, all the evidence that was produced before the jury, and which had been stenographically reported, was filed in the equity court for its consideration in connection with the verdict.

The cause was brought on to hearing upon the verdict and the evidence returned; and upon full consideration and after a carefully prepared opinion, the court passed the decree of the 16th of May, 1900, from which this appeal is taken.

By that decree the court approved, ratified, and adopted the verdict of the jury; and decreed, in accordance with the findings of the jury, that the paper-writing, bearing date the 14th day of July, 1896, and purporting to be the last will and testament of Mary Beyer, deceased, was not the last will and testament of said Mary Beyer, but that said Mary Beyer died intestate as to her real estate. The cause was then referred to the auditor to state an account of rents and profits; and the decree awarded costs against the defendants; and as to other and further questions that may arise they are reserved for further directions.

There have been two principal questions argued upon this appeal: First, as to the jurisdiction of a court of equity to take cognizance of the case, frame issues for trial by jury in a court of law, and to pass a decree such as that appealed from. And, second, assuming the jurisdiction to exist, whether the decree was justified by the verdict and the facts found in the case.

1. Before the act of Congress of June 8, 1898, entitled "An act conferring on the supreme court of the District of Columbia jurisdiction to take proof of the execution of wills affecting real estate, and for other purposes," the supreme court of this District, holding special terms for orphans' court business, had no power or jurisdiction to receive proof of and to admit to probate a will or codicil as a devise of real estate. Campbell *v.* Porter, 162 U. S. 478. That act, however, has changed the law upon the subject; but it has declared that it shall apply only to wills and testaments thereafter offered for probate; provided that any person interested under any will theretofore filed in said court *may offer the same for probate* as a will of real estate, whereupon such proceedings shall be had as by this act are authorized in regard to wills hereafter offered for probate. Section 8, act of Congress, June 8, 1898. This latter provision, of course, does not apply to the case of a will and testament made and admitted to probate, as to the personal estate of the deceased, prior to the passage of the act of Congress, and where the heir-at-law takes proceedings, not to have the will admitted to probate, but to have what professes to be the will of the deceased, declared null and void as to *to* the real estate of the deceased, since the passage of the act of Congress. If this case had originated under a will made since the passage of the act of Congress just referred to, the devisee could only claim by virtue of the probate of the will had under that act. The supreme court of the District, holding special sessions for orphans' court business, has been given full and plenary jurisdiction over the subject of admitting or refusing probate of

wills affecting real estate, just as in the case of wills and testaments affecting personal estate; and the judgment of that court cannot be called in question in any collateral proceeding. It is given by the statute an exclusive jurisdiction over the matter of probate, subject, of course, to review on appeal. Act of Congress, sections 2, 3, 6 and 7; Case of Broderick's Will, 21 Wall. 503; Allen *v.* McPherson, 1 Ho. L. Cas. 191.

But in the present case the paper purporting to be the will was made, and the party supposed to be the maker of it, died in 1896, before the act of Congress was passed; and the case, therefore, must be decided according to the law as it existed at the time of the death of the supposed testatrix, and when the paper was offered for probate as to the personal estate.

As we have seen, the title to the real estate owned by the deceased, and which is the subject of the alleged devise by the paper in question, was and is of a mere equitable character, or the mere right of an equity of redemption, the legal estate being vested in trustees. This equitable title, therefore, was not such as would, ordinarily, maintain an action of ejectment at law for the recovery of the land by the heir-at-law against parties claiming as devisees under the alleged will of the deceased, the grantor in the deed of trust. Lincoln *v.* French, 105 U. S. 614; Brobst *v.* Brock, 10 Wall. 519; Morsell *v.* Nat. Bank, 91 U. S. 357; Van Ness *v.* Hyatt, 13 Pet. 298; Bank of Metropolis *v.* Guttschlick, 14 Pet. 19.

Seeing, then, that there was no jurisdiction in the probate court, and that an action of ejectment can only, as a general proposition, be maintained on a legal title, for the recovery of the land by the heir-at-law, it would seem to be clear beyond doubt that the remedy for the heir-at-law was by a bill in equity, for the purpose either of having the impediment to the right of maintaining an action at law removed or restrained, or of having issues framed and sent to a court of law for trial by a jury. Otherwise there might be a failure of justice for the want of a fit and proper remedy by which to attain it.

The English decisions are numerous by which bills have been maintained in cases like the present. And without undertaking to refer to them all, we shall refer to some few of the more recent and controlling of them. And the first to which we shall refer is the case of Pemberton *v.* Pemberton, 13 Ves. 290. In that case, the bill was filed by the sisters of the testator, claiming as coheiresses-at-law, against the devisee of an equitable estate, and an issue, *devisavit vel non*, was directed, and which was tried in the common pleas, before Chief Justice Mansfield, and a verdict was found
135 in favor of the will. Upon motion for a new trial, heard before Lord Eldon, the chancellor said: "This bill is rather new in principle. I have no doubt, that heirs-at-law, entitled to the estates, of which their ancestors were seised, though only in equity, and therefore not having the means of proceeding at law, may come into equity, merely to recover the possession of those estates, and to have the deeds delivered up. I will not say, that in some cases they may not apply to have a will delivered up as an instrument that

ought not to vex their title; which, however, if it retains in it anything that has validity, ought not to be delivered up. But the course has been to file a bill, stating the reasons they cannot bring an ejectment; such as mortgages, outstanding terms, etc., and in general cases this court, as it cannot try the validity of a will, sends that to be determined by the proper tribunal; and afterwards does what is right." These latter remarks have been explained or qualified in subsequent cases.

The next case that may be referred to, is that of McGregor *v.* Topham, 3 Hare, 488, 496. That was a bill in equity filed on behalf of an heiress-at-law against a devisee, impeaching the validity of a will upon the ground of fraud and undue influence, and where the estate was equitable, and consequently no action of ejectment could be maintained. In that case there was an issue *devisavit vel non* sent to a court of law for trial, and the verdict was in favor of the respondent. The plaintiff, the heir-at-law, made a motion for a new trial, but the motion was refused by the vice-chancellor, and the case was taken to the House of Lords on appeal, where the decree was affirmed. 3 Ho. L. Cas. 132. In that case, it was held by the House of Lords that though there may be an outstanding legal estate, which compels the heir-at-law to come into equity, he cannot, on that account, claim a right to have the issue tried a second time, if the court, in the exercise of its discretion, should deem the first verdict satisfactory. And, as we suppose, for the same reason, the party claiming as devisee could have no right to a second or new trial of the issue.

The next and last case to which we shall refer on this question, is that of Boyse *v.* Rossborough, 6 Ho. L. Cas. 2. That is a case of close analogy to the present in many of its facts, and is of the highest authority, as it was most elaborately argued both at the bar and by the lord chancellor in the decision of the case.

In that case, there were outstanding terms which formed an obstacle to the maintenance of ejectment at law for the real estate in question, and the bill was filed by an heir-at-law against the devisee to impeach the will of the real estate as having been obtained by undue influence or fraud practiced upon the alleged testator. There was an issue *devisavit vel non* made up and sent to a court of law for trial, the defendant's counsel not objecting. The issue was tried, and the verdict was against the will. Motion was made for a new trial, and was overruled; whereupon an order was made declaring the paper-writing purporting to be the will, null and void as a devise of the real estate in the pleadings mentioned.

It was strongly argued on the part of the appellant, the devisee, that the course pursued by the court below in that case, that of granting an issue *devisavit vel non* on the application of the heir-at-law, in a suit instituted by him to impeach a will, was without justification in principle or precedent, and was contrary to the settled practice of courts of equity. That, according to the contention of counsel, when a devisee files a bill against an heir-at-law for the purpose of establishing a will, the heir-at-law has, no doubt, a right to an issue *devisavit vel non*, for the purpose of compelling the devisee to give full and clear proof of the will. But when the heir-at-law files a bill

against a devisee impeaching a will of real estate, the heir-at-law has no right to such issue. It was, however, conceded by the counsel for the devisee, that if there should be such impediments to the heir trying his title at law as to prevent him from maintaining an action at law for that purpose, the ordinary course was then to file a bill in a court of equity to remove such impediments, and leave the heir to his legal remedy; and if the impediments are of such a kind as to prevent the court of equity from effecting that purpose; if the circumstances are such that the heir cannot have relief at law in any other way, then, but then only, it may grant him an issue.

But on the part of the appellee, the heir-at-law, it was insisted by counsel, that the proceedings that had taken place in the court below were entirely regular, and in perfect conformity with the principles and practice of the court of chancery. That in a bill by an heir-at-law, impeaching a will on grounds such as existed in that case, and where undue influence or fraud had produced what might be denominated the absence of a disposing mind, it was entirely within the discretion of the court either to grant an issue *devisavit vel non* or to leave the heir to proceed by ejectment, the court of equity simply removing out of his way all those technical obstacles which might prevent the decision of his legal title: that the court is not bound to adopt one of those courses in preference to the other, but may take either in its discretion.

This contention of counsel for the heir-at-law was supported to its full extent by the unanimous judgment of the House of Lords, the opinion being delivered by Lord Chancellor Cranworth. It was held, that a court of equity had full power, both on principle and precedent, to exercise its discretion either to direct an issue, *devisavit vel non*, or merely to remove obstacles out of the way of the heir-at-law asserting his legal title in an action at law. It was, moreover, held, that an appellate court will not interfere with the exercise of that discretion, unless it appears that injustice has been, or will likely be, the consequence.

In answer to the argument that was made in that case, that the consequences of the course that was taken by the court below was prejudicial or injurious to the devisee, although adopted with the sanction, if not at the suggestion, of the counsel of the devisee, the lord chancellor said:

"In order to come to a just conclusion on this point, let us consider what was the precise practical difference to the appellant
136 from the adoption of the one course rather than the other. When on a bill, by an heir disputing a will, nothing is done beyond the removal of the legal impediments, then the heir brings an action of ejectment against the party in possession claiming as devisee; and assuming the heirship of the plaintiff to be, as it was in this case, admitted, the defendant begins at the trial, and adduces his evidence in support of the will. The heir then meets this case by such evidence as he can bring to impeach the will. The defendant replies, and the jurymen give their verdict. Precisely the same thing happens on an issue *devisavit vel non*. So far, therefore, as the trial is concerned, it is of no importance which course is taken.

Supposing the verdict to be against the will, and there is no motion for a new trial, then, if the proceeding was by ejectment, the heir obtains possession by virtue of a writ of *habere facias possessionem.* If the course taken was to direct an issue, then the court of chancery causes possession to be given to the heir. In either case the devisee is compelled to give up possession to the heir; and whether this result follows from one species of process or another cannot be material. If the result of the trial is different, and the verdict is in favor of the devisee, then, whatever course was taken for the purpose of trying the validity of the will, the bill of the heir will be dismissed, and the devisee will retain possession."

The question of the want of jurisdiction of equity, so much discussed at the bar in the argument of this case, is really not involved. It was only a question of discretion in the court below as to the manner of having the validity of the will tried; and the exercise of that discretion is not the subject of review, except where it is shown to be abused.

But in this case the parties made their own election as to how they would have the validity of the will tried. By solemn stipulation they agreed that issues should be formed and sent to a court of law for trial, and, upon the finding and verdict of the jury, that "*a decree should be entered in accordance with said findings,*" subject to the right of appeal. The devisees, by their counsel, cannot now be heard to urge, with any judicial propriety, that their stipulation, after all the cost, labor, and delay incurred, consequent upon that stipulation, should be treated as nugatory; that while they led the court to adopt a course, in its discretion, that it might not have adopted but for that stipulation, they should not now, because the result has been adverse to their expectations, be allowed to repudiate their solemn agreement for the manner of conducting the case. They must accept the result for the possibility of which they have stipulated.

2. With respect to the question, whether upon the facts the verdict of the jury ought to be sustained, we cannot seriously entertain a doubt. The jury have passed upon the facts in the trial of the issues, and it is only where the court can see that a new or second trial of the issues is required to effectuate justice that a new trial will be granted. In this case no motion for a new trial was made to the court of equity upon the return of the verdict to that court, upon the issues formed by it. It was for that court to say, whether the finding of the jury was satisfactory or not. The evidence taken at the trial of the issues would seem to have been eminently proper for the consideration of the jury. The justice before whom the issues were tried at law, as well as the justice in the court of equity, were entirely satisfied with the verdict. The trial in all respects seems to have been fairly conducted. The jury were fully and fairly instructed by the court, at the instance of the respective parties, and all the prayers offered by each side were granted, read and fully explained to the jury. We can perceive no substantial ground upon which the verdict should be set aside, and a new trial upon the issues granted. As there was no other evidence in the case than

that upon which the jury acted and based their verdict, if the court below was satisfied, as it appears to have been, that the verdict was the fair result and conclusion from that evidence, the court was certainly justified in accepting and adopting the verdict, and making it the basis of its decree. It would only be in a case where an appellate court could plainly see from the facts of the case, that the verdict of a jury, upon issues in a case like the present, was not fairly supported by the facts, that a new trial of the issues would be granted, as against the order of the court below. In this case, we perceive no such ground for a new trial. It follows that the decree must be affirmed, *and it is so ordered. Decree affirmed.*

137 THURSDAY, *December 6th, A. D.* 1900.

LOUIS BEYER, LOUIS BEYER, JUNIOR, HELEN B. JOHNSON, and LOUIS BEYER, Junior, Executor, Appellants,
vs.
CAROLINE LE FEVRE.
No. 1009.
October Term, 1900.

Appeal from the supreme court of the District of Columbia.

This cause came on to be heard on the transcript of record from the supreme court of the District of Columbia, and was argued by counsel. On consideration whereof, it is now here ordered, adjudged and decreed by this court that the decree of the said supreme court, in this cause be, and the same is hereby, affirmed with costs.

Per MR. CHIEF JUSTICE ALVEY.

December 6, 1900.

138 TUESDAY, *December 11th, A. D.* 1900.

LOUIS BEYER, LOUIS BEYER, JUNIOR, HELEN B. JOHNSON, and Louis Beyer, Junior, Executor, Appellants,
vs.
CAROLINE LE FEVRE.
No. 1009.

On motion of Mr. Franklin H. Mackey, attorney for the appellants in the above-entitled cause, it is ordered by the court that said appellants be allowed an appeal to the Supreme Court of the United States on giving supersedeas bond in the sum of three thousand dollars.

139 In the Court of Appeals of the District of Columbia.

LOUIS BEYER ET AL., Appellants,
vs.
CAROLINE LE FEVRE, Appellee.
No. 1009.

Now comes Louis Beyer, one of the appellants in the above-entitled cause, and informing the court that his co-appellants in this cause have refused to join with him in an appeal to the Supreme

Court of the United States from the decree of this court rendered herein, wherefore he prays the court that he may be allowed a summons and severance as to his said co-appellants and be allowed to prosecute this appeal separately in his own behalf.

FRANKLIN H. MACKEY,
Att'y & Sol. for Louis Beyer.

The appellants Louis Beyer, Jr., Helen B. Johnson, and Louis Beyer, Jr., executor, hereby waive notice of this motion, and also summons, and consent to the severance prayed for and that an order may be passed to that effect.

JOHN RIDOUT,
For Louis Beyer, Jr., in His Own Right and as Executor, and for Helen B. Johnson.

(Endorsed:) No. 1009. Louis Beyer, *et al.*, appellants, *vs.* Caroline Le Fevre. Motion for severance and waiver of notice. Court of Appeals District of Columbia. Filed Dec. 20, 1900. Robert Willett, clerk.

140 THURSDAY, *December 20th, A. D.* 1900.

LOUIS BEYER, LOUIS BEYER, JUNIOR; HELEN B. Johnson, and Louis Beyer, Junior, Executor, Appellants,
vs.
CAROLINE LE FEVRE.
No. 1009.
October Term, 1900.

It appearing to the court that Louis Beyer, Junior, Helen B. Johnson, and Louis Beyer, Junior, executor, have refused to join in the appeal of Louis Beyer herein to the Supreme Court of the United States, now on motion of Mr. Franklin H. Mackey, of counsel for said Louis Beyer, it is ordered by the court that he be allowed to prosecute said appeal separately in his own behalf.

Per MR. CHIEF JUSTICE ALVEY.

December 20, 1900.

141 Know all men by these presents, that we, Louis Beyer, as principal, and Louis Hartig, as surety, are held and firmly bound unto Caroline Le Fevre in the full and just sum of three thousand dollars to be paid to the said Caroline Le Fevre her certain attorney, executors, administrators, or assigns; to which payment, well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally, by these presents.

Sealed with our seals and dated this 22nd day of December, in the year of our Lord one thousand nine hundred.

Whereas, lately at a Court of Appeals of the District of Columbia, in a suit depending in said court, between Louis Beyer, Louis Beyer Junior; Helen B. Johnson and Louis Beyer Junior executor, appellants and Caroline Le Fevre appellee a decree was rendered against the said appellants and the said appellant Louis Beyer having severed from his co-appellants — having been allowed an appeal

to the Supreme Court of the United States to reverse the decree in the aforesaid suit, and a citation directed to the said Caroline Le Fevre citing and admonishing her to be and appear at a Supreme Court of the United States, to be holden at Washington within 30 days from the date thereof,

Now, the condition of the above obligation is such, that if the said appellant Louis Beyer shall prosecute his said appeal to effect, and answer all damages and costs if he fail to make his plea good, then the above obligation to be void; else to remain in full force and virtue.

LOUIS BEYER. [SEAL.]
LOUIS HARTIG. [SEAL.]

Sealed and delivered in the presence of—
FRANKLIN H. MACKEY.

Approved by—
M. F. MORRIS,
Associate Justice, Court of Appeals, D. C.

[Endorsed:] No. 1009 Louis Beyer, appellant *vs.* Caroline Le Fevre Supersedeas bond on appeal to Supreme Court U. S. Court of Appeals District of Columbia Filed Dec. 24 1900 Robert Willett, clerk

142 UNITED STATES OF AMERICA, *ss:*

To Caroline Le Fevre, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, at Washington, within 30 days from the date hereof, pursuant to an order allowing an appeal, filed in the clerk's office of the Court of Appeals of the District of Columbia, wherein Louis Beyer is appellant and you are appellee, to show cause, if any there be, why the decree rendered against the appellant should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness, the Honorable Martin F. Morris, associate justice of the Court of Appeals of the District of Columbia, this 24th day of December, in the year of our Lord one thousand nine hundred.

M. F. MORRIS,
Associate Justice of the Court of Appeals of the District of Columbia.

Service accepted this 26th day of December, 1900.

CHAS. POE,
Att'y & Sol'r for Caroline Le Fevre.

[Endorsed:] Court of Appeals, District of Columbia. Filed Dec. 27, 1900. Robert Willett, clerk.

143 Court of Appeals of the District of Columbia.

I, Robert Willett, clerk of the Court of Appeals of the District of Columbia, do hereby certify that the foregoing printed and typewritten pages, numbered from 1 to 142, inclusive, contain a true copy of the transcript of record and proceedings of said Court of Appeals in the case of Louis Beyer, Louis Beyer, Junior, Helen B. Johnson, and Louis Beyer, Junior, executor, appellants, *vs.* Caroline Le Fevre, No. 1009, October term, 1900, as the same remain upon the files and records of said Court of Appeals.

Seal Court of Appeals District of Columbia.

In testimony whereof I hereunto subscribe my name and affix the seal of said Court of Appeals, at the city of Washington, this 28th day of December, A. D. 1900.

ROBERT WILLETT,
Clerk of the Court of Appeals of the District of Columbia.

Endorsed on cover: File No. 18,031. District of Columbia, Court of Appeals. Term No. 237. Louis Beyer, appellant, *vs.* Caroline Le Fevre. Filed January 22, 1901.

No. 237.

Brf. of Mackey & Davis for Appt.

IN THE

Supreme Court of the United States.

Filed April 11, 1902.

October Term, 1901. No. 237.

LOUIS BEYER, APPELLANT,

vs.

CAROLINE LE FEVRE.

Appeal from the Court of Appeals of the District of Columbia.

BRIEF FOR THE APPELLANT.

FRANKLIN H. MACKEY,
HENRY R. DAVIS,
FOR APPELLANT.

Rewalford, Printer,
City of Washington.

Supreme Court of the United States.

October Term, 1901.

LOUIS BEYER, *Appellant*,
vs.
CAROLINE LE FEVRE. } No. 237.

Appeal from the Court of Appeals of the District of Columbia.

BRIEF FOR THE APPELLANT.

I.

STATEMENT OF THE CASE.

This is a suit in equity, begun April 7, 1899, in the Supreme Court of the District of Columbia, by the appellee against the appellant, Louis Beyer, and Louis Beyer, Jr., individually and as executor; Helen B. Johnson, and Myer Cohen and Adolph G. Wolf, trustees. His co-defendants having refused to join in the appeal to this court, the appellant was duly allowed, on summons and severance, to prosecute the appeal alone. (R., 142–3.)

The material allegations of the bill are as follow: On May 11, 1896, Mary Beyer, wife of the appellant, made a deed of trust of certain real estate in the District of Columbia to one Glover and one Parker, to secure a debt of $2,800. The debt has not been paid, and the legal title to the property is still in Glover and Parker. (R., 2, *fol.* 1–2.) The deed of trust is in the usual form, one of the trusts being, "until any sale and conveyance as hereinafter provided for to permit the said

Mary Beyer, her heirs and assigns, *to possess and enjoy* the said described premises," &c. (R., 6, *f.* 9.)

The appellant and his wife were childless, and on July 26, 1896, the wife died, leaving, according the to bill, as her only heirs-at-law and next of kin the appellee, a sister, one Elizabeth K. Maus, another sister, and Louis Beyer, Jr., a nephew. (R., 2, *f.* 2.) On July 14, 1896, twelve days before her death, the wife, Mary Beyer, executed a paper-writing in form a last will and testament, devising and bequeathing her entire estate to Louis Beyer, Jr., and Helen B. Johnson; containing a request, if not a charge, for the maintenance of a home and home comforts for the appellant, and appointing Louis Beyer, Jr., executor. (R., 2–3, 8–9.) This paper-writing was duly admitted to probate as a will of personalty, and Louis Beyer, Jr., was duly qualified as executor. Shortly thereafter the appellant filed a caveat to the paper-writing, which, however, according to the bill, he withdrew in consideration of the conveyance to him of a portion of the real estate devised, amounting in value to one-half thereof. (R., 3, *f.* 4–5.)

Mrs. Maus, the sister of the decedent and of the appellee, sold and quit-claimed her interest in the estate to Louis Beyer, Jr., and Helen B. Johnson (R., 3–4); and the appellant subsequently encumbered the real estate conveyed to him by a deed of trust to Cohen and Wolf, trustees, to secure a debt of $2,000 to one Schoenhop, who has never, at any time or in any manner, been made party to the cause. (R., 4.)

The heart of the bill of complaint is in the allegations that Mary Beyer did not possess testamentary capacity at the time of making the paper-writing in controversy, and that the same was procured to be made through the undue influence, and, in effect, fraud of Louis Beyer, Jr., and Helen B. Johnson (R., 2–3, *f.* 3–4); and in the prayer that the said paper-writing " be decreed to be not (the) last will and testament" of Mary Beyer. (R., 4, *f.* 6.)

The defendants, Louis Beyer, Jr., and Helen B. Johnson, answered the bill separately, but identically, *mutatis mutandis*,

denying all the accusatory allegations; asserting Mary Beyer's full testamentary capacity; denying that the applicant's caveat was dismissed for a consideration, the fact being that the said caveat was joined in by both of the said defendants, and was dismissed for want of prosecution; alleging that Mrs. Maus made her quit-claim to the defendant Johnson, her daughter, without consideration, for the purpose of emphasizing her conviction that Mary Beyer's will was good and valid (R., 13–17); and setting up the following objections to the bill (R., 14–15, *f.* 24–5; R., 17, *f.* 29–30):

"That on the 8th day of February, 1899, the complainant filed her caveat to said will in this court, sitting as an Orphans' Court, but she has never proceeded thereunder nor procured issues thereon, and said caveat is still pending and undetermined.

"Defendant further says that this court, sitting as an Orphans' Court, has exclusive jurisdiction to determine the validity of said will, if said complainant now has the right to litigate its validity, which defendant denies.

"He further says that if complainant has any right to attack said will she has her full and adequate remedy by an action of ejectment.

"And the defendant claims the same benefit of this objection as if raised by plea or demurrer.

"Defendant is advised and says that the complainant has not in and by her said bill made or stated any such case as entitles her to the relief sought, or to any relief in this court, sitting in equity, and he claims the same benefit of this objection as if raised by demurrer."

Cohen and Wolf answered, asserting the validity of the deed of trust to them (R., 18), and the appellant demurred generally to the bill (R., 19).

Various motions for a receiver, &c., were made in the cause from time to time, but call for no notice by this court.

While the pleadings were in the condition above shown the following stipulation was made (R., 126):

"It is hereby stipulated by and between the parties to this cause this 20th day of June, 1899, that the court may make

an order certifying certain issues, to be named in said order, to be tried by a jury of the Circuit Court, and that the findings by said jury upon said issues shall be returned to this court; whereupon a decree shall be entered in accordance with said findings, all rights of appeal as in cases of issues from the Orphans' Court being hereby reserved."

Upon the stipulation the court made the following order (R., 126–7):

"Ordered by the court this 25th day of June, 1899 (the parties to this cause consenting hereto), that the following issues to be tried by a jury be, and they hereby are, certified to the Circuit Court, to-wit:

"First. Was the said Mary Beyer at the time of the execution of the paper-writing bearing date the 14th day of July, A. D. 1896, and purporting to be her last will and testament, of sound and disposing mind, memory and understanding, and capable of executing a valid deed or contract?

"Second. Was the execution of the said paper-writing bearing date the 14th day of July, 1896, and purporting to be the last will and testament of the said Mary Beyer, procured by fraud, circumvention, or undue influence practiced or exercised upon the said Mary Beyer by Louis Beyer, Jr., Helen B. Johnson, or by either of them, or by any other person?

"Third. Were the contents of the paper-writing bearing date July 14th, 1896, and purporting to be the last will and testament of the said Mary Beyer, known to her at the time of the alleged execution thereof?"

Thereupon the issues were tried before a jury, the testimony and proceedings being set out in full in the record, at pages 28–113, and the verdict of the jury being set forth at page 20. The jury answered all the issues in the affirmative, "thereby," in the language of the Court of Appeals of the District of Columbia, "affirming that while the deceased was of sound and disposing mind, and knew the contents of the paper, yet the execution of the same was procured by fraud, circumvention, or undue influence." (R., 136, *f.* 134.)

A motion for a new trial, addressed to the trial judge, was overruled and the answers of the jury were certified to the court sitting in equity. (R., 129–131.)

At this stage of the cause, and not before, one Helen B. Fenton was alleged by the appellee to be a niece and heir-at-law and next of kin of Mary Beyer, and on the appellee's motion she was made a party defendant in the cause. (R., 26–7.) Her answer (R., 114, 115) is unimportant, its main feature being reliance upon the "setting aside" of the will.

The case having again come on before the Court sitting in Equity, the Court (Barnard, J.), sustained the bill and the verdict of the jury, thereby vacating the will. The Court's decree is at pages 121–2 of the record, and its opinion at pages 116–120.

From this decree the appellant and his co-defendants, Louis Beyer, Jr., and Helen B. Johnson, after due summons and severance (R., 123), appealed to the Court of Appeals of the District of Columbia, which affirmed the lower court. (Opinion, R., 133–142.)

II.

ASSIGNMENTS OF ERROR.

The court below erred:

1. In affirming the decree of the Supreme Court of the District of Columbia.

2. In holding that the Supreme Court of the District of Columbia sitting in Equity had jurisdiction of this cause and its subject-matter.

3. In sustaining the answers of the jury to the questions submitted to it.

4. In not adjudging, ordering and decreeing that the bill of complaint should be dismissed.

III.

ARGUMENT.

The questions presented for consideration may thus be stated:

1. Had the Supreme Court of the District of Columbia, sitting as an Equity Court, jurisdiction to entertain the bill of complaint?

2. If not, did the stipulation of the parties cure the want of jurisdiction, and what is the effect of the stipulation? And,

3. If the stipulation is controlling, is the verdict of the jury on the issues sustained or justified by the evidence?

1. In order to a clear apprehension of the question of equitable jurisdiction as presented in the case, it is necessary that the exact scope of the bill of complaint should be kept constantly in mind.

In its nakedness the bill, in connection with its exhibits, alleges (*a*,) an equitable interest in the supposed testatrix in certain real estate, which equitable interest included, however, the right of possession and enjoyment until the happening of a contingency which has not yet happened; (*b*,) the execution by the supposed testatrix of a supposed will when she had not the testamentary capacity to execute such an instrument, and which instrument was procured to be executed by fraud; (*c*,) the admission of the said instrument to probate and record as a testament or will of personal estate; and (*d*,) the conveyance by the beneficiaries of the supposed will of a portion of the real estate and its subsequent encumbrance by the grantee. The prayers of the bill are (*a*,) that the supposed will be decreed not to be the will it purports to be; (*b*,) that the encumbrance by the grantee of the portion of the estate conveyed to him by the supposed beneficiaries of the supposed will be decreed to be void; (*c*,) for a receiver of all the real estate of the supposed testatrix and an accounting by the defendants of all rents, &c., received by them; and (*d*,) for general relief.

Stripped of its superfluities and reduced to its one essential, this bill is, therefore, a bald appeal to a Court of Equity to decree that a paper-writing already admitted to probate and record as a will of personalty be decreed not to be a will of realty, as having been procured by fraud and executed by a person wanting testamentary capacity.

It is difficult to see what this amounts to except a direct application to a Court of Equity to determine the validity of a will and to direct its probate or the contrary; and this upon

matters pre-eminently subjects of inquiry on trial by jury. But it is contended for the appellee, and was in effect so held by both of the lower courts, that the outstanding of the legal title to the real estate was a bar to the right of the heirs to bring ejectment, and that for this reason the heirs had the right to resort to equity. An examination of this contention, in the light of principle, will dissipate it.

A. Undoubtedly, as stated by the Court of Appeals, "before the Act of Congress of June 8, 1898, * * * the Supreme Court of this District, holding special terms for Orphans' Court business, had no power or jurisdiction to receive proof and to admit to probate a will or codicil as a devise of real estate. Campbell *vs.* Porter, 162 U. S., 478;" and the provisions of Section 8 of that act (2 Sup. R. S., 777), as to the re-offering as a will of real estate of any will filed before the passage of the act, quite as clearly refers to such re-offering of a will for probate by some person interested thereunder, and has no reference to proceedings by an heir-at-law in contest of the will. (R., 137.) Since the passage of the act, as the Court of Appeals also rightly holds, a devisee under a will probated in accordance with its provisions can claim only under such probate; for the Supreme Court of the District, sitting as an Orphans' Court, is given by the act "full and plenary jurisdiction over the subject of admitting or refusing probate of wills affecting real estate" (R., 137–8), and before any such will can be admitted to probate the heir-at-law must have notice and his due "day in court," whereby the probate of the will becomes final and conclusive, subject, of course, to all rights of appeal.

Accordingly, before the act any will of real estate had to be proved anew in every action or proceeding in which it was set up (subject, of course, to the plea of *res judicata* in a proper case), and either the heir-at-law or any one claiming under him had always the right and opportunity in such action or proceeding to contest the validity of the will. But before the present action it was never known in this jurisdiction that in

advance of the assertion of some right under a will of real estate the heir-at-law could go into equity in any suit in the nature of a suit to quiet title by annulling the will.

B. It is not supposed that even the present is such a suit, as in reality it is not; it is, as already stated, in scope and effect a suit for the naked purpose of trying in equity the validity of a will on the grounds of fraud and want of testamentary capacity; for even if it be said that the equity rules of this court dispense with the necessity of including in a bill in equity the ancient jurisdictional clause, it yet remains that the jurisdiction of equity must be gathered from the averments of the bill. It is supposed by the appellee that the bill in this case is one of the class described below, in which a court of equity is applied to in aid of a pending or contemplated ejectment. If so, the following essentials are wanting: (1,) it is not alleged that the defendants or any of them have set up, or intend to set up, the paper in question as a will of real estate; (2,) it is not alleged that the defendants, or any of them, claim any right under the paper as a will of real estate; (3,) it is not alleged that the defendants, or any of them, are in possession of the real estate or any part thereof; (4,) it is not alleged that the appellee wishes to bring or contemplates bringing an action of ejectment and finds a bar to such course in the existence of the paper, which ought to be delivered up in removal of such bar; (5,) it is not alleged that the appellee is prevented from bringing such action by reason of not having the legal title or not being entitled to possession; and (6,) especially is it not alleged that in case of an action of ejectment the defendants will or may set up the outstanding legal estate as a bar.

In all of the cases relied upon in the courts below and which are hereinafter examined, it will be found that all, or some of these essentials are present, and the general rule to be extracted from them will be found not to exceed this: That where the heir-at-law wishes to raise the question of the validity of a will of real estate and cannot bring an action of

ejectment because the legal title is outstanding he may go into equity to have the bar to his right removed by a decree restraining the claimant under the will from setting up the legal title in himself or another as a defense to an action of ejectment, and as an incident, the court of equity having acquired jurisdiction for the purpose of removing the impediment to the action may direct an issue of *devisavit vel non.*

And undoubtedly in England, as also in the common law States of this country, in the absence of statute, where a will respects real estate, jurisdiction touching it belongs to the courts of common law.

2 Story, Eq. Jur., Secs. 1445–47 and Notes.

And, as already stated, a will of real estate in the District of Columbia before the passage of the act of 1898 had to be offered and proved in every cause in which it figured. The pretense on which equity took jurisdiction over the validity of wills was that inasmuch as its jurisdiction could rightfully be invoked to enjoin the devisee from setting up an oustanding legal title as a bar to an ejectment, it could, upon the familiar principle of having obtained jurisdiction for one purpose, claim jurisdiction for all purposes. In every cause, as is emphasized by the case of Jones *vs.* Jones, 3 Mer., 167, the jurisdictional allegations must appear in the bill, or it will be demurrable. And in Pemberton *vs.* Pemberton, 13 Ves., 290, more fully considered hereinafter, the correct principle is pointed out.

Anticipating consideration of the cases relied on below, it may be here pointed out that the action of ejectment tries the right of possession only, although the rule is generally stated to be that the plaintiff must prove that he has the legal right in the premises, and the right of entry, and that the defendant is in possession. In the case at bar, according, not to the appellee's bill, but to her contention, she has not the legal estate, and for that reason cannot bring ejectment. But in the same breath, she says that the legal estate is outstanding in trustees, so that merely getting the will out of the way would not help her as to an ejectment, for, on her own contention, she must get rid of the legal estate in the trustees before she can bring her

ejectment, and the trustees are not parties to this cause, and, moreover, their legal estate is unquestioned. Is not this proceeding, therefore, purely and simply a scheme to try the validity of the will in equity, with no ulterior object in the proceeding in which the court can be asked to aid her? *A fortiori* is her case unsupportable in equity, seeing that it is not alleged that the defendants, or any of them, are in possession.

Nor is the appellee's position sustained by any of the cases relied on below. These cases will be examined in the order of their citation.

The case of Pemberton *vs.* Pemberton, 13 Ves., 290, is, as to its facts, very unsatisfactorily reported. It is said to have arisen upon a bill filed by the sisters of the testator claiming as co-heiresses at law against the devisee of an equitable estate, but under what conditions does not otherwise appear. In that case, the Chancellor, Lord Eldon, used the following language:

"The authority to declare what is and what is not a man's last will is denied to this court. This bill is rather new in principle. I have no doubt that heirs at law entitled to the estates of which their ancestors were seized, though only in equity, and *therefore* not having the means of proceeding at law, may come into equity, applying to recover the possession of those estates and to have the deeds delivered up. I will not say that in some cases they may not apply to have a will delivered up as an instrument that ought not to vex their title; which, however, if it retains in it anything that has validity ought not to be delivered up. But the course has been to file a bill stating the reasons why they cannot bring an ejectment: mortgages, outstanding terms, &c.; and in general cases this court, as it can not try the validity of a will, sends that to be determined by a proper tribunal, and afterwards does what is right. The habit in doing this has been merely to direct the heir to bring his ejectment, providing that the defendants shall not set up at law a term, satisfied or unsatisfied; and, those obstacles being removed, and a trial had in that way under the control of a court of law, they come back for the account,

the deeds, &c.; which course leaves all the encumbrances just as much encumbrances as if the possession had not been changed. There is great convenience in giving relief in that shape rather than by directing issues; for certainly the question whether a new trial should or should not be had is discussed with much more satisfaction where the trial was had than in the court out of which the issue was directed."

Pemberton *vs.* Pemberton, 13 Ves., 290, 297–8.

In McGregor *vs.* Topham, 3 Hare, 488, the bill was filed by one claiming to be customary heiress of one Richard Wrightson, and setting forth a pretense on the part of the defendants that Wrightson had left a certain will. The bill prayed a declaration that the claimant was in fact heiress as alleged, and that "if the defendants should set up any such will of Richard Wrightson, then that it might be ascertained whether any such will was or was not duly signed and published by him whilst of sound and disposing mind, memory and understanding, and that if necessary, an issue might be directed *or* that the plaintiffs might be at liberty to bring ejectment, and the defendants might be restrained from setting up the legal estate vested in the said trustees [by virtue of a settlement on the second marriage of Wrightson's widow to Topham] in bar of, or as a defense to, such issue or action."

An issue having been directed and found in favor of the will, a new trial was denied, and in the House of Lords the sole question was as to the propriety of the Chancellor's refusal of a new trial. The Lord Chancellor, Brougham, speaking of the question "whether or not an heir-at-law, before he can be disinherited by will has a right to an issue" said, "We have nothing to do with that rule. Here the question is * * * whether or not we should * * * grant a second trial."

McGregor *vs.* Topham, 3 H. L. C., 132, 153.

And the main case relied upon, Boyse *vs.* Rossborough, 6 H. L. C., 2, will be found upon examination not to have extended the rule beyond the limits above stated.

In that case, the testator, one Colclough, left a will in favor of his wife and bearing date August 6th, 1842. The wife

subsequently married one Boyse, upon whom she made a marriage settlement. Colclough's heiress, Mrs. Rossborough, with her husband, filed a bill in the Court of Chancery in Ireland against Mr. and Mrs. Boyse, alleging that the latter had by undue influence procured from Colclough a will executed August 5th, 1842, but that, finding it not sufficiently favorable to her wishes, had procured the will of August 6th to be executed, the testator being led to believe that by the second will he was only curing an alleged uncertainty in the former. In the statement of the case is the following, showing the exact character of the proceeding:

"The bill stated the settlement made on the marriage of the appellant with her second husband, and that the respondents wished to proceed by ejectment to recover the Wexford estates, but that there were outstanding terms which would be set up as a bar to any ejectment. The bill prayed that the will of the 6th of August, 1842, might be declared void, and delivered up to be cancelled, *or* that an issue might be directed to try *whether the freehold estates of Mr. Colclough were devised by the said will;* and that if it should be found that the said estates descended on his heiress at law, that the defendants might be ordered to deliver up the title deeds relating to the estates, and to account for the rents and profits of the lands received by them, or that the plaintiff might be at liberty to proceed at law by ejectment to recover the said estates, and the court might prevent any outstanding terms being set up, and for further relief."

An issue was directed without objection on the part of the respondents (page 9), which was found against the respondents, who moved for a new trial, which was refused, and a decree in conformity with the issue was thereupon passed. The following language of the Lord Chancellor is so pertinent to the case at bar that no apology need be offered for its insertion at length.

"The first point made in argument by the appellant was, that the original decree was wrong, and so that all the proceedings consequent on it must fall with it.

"The relief was asked by the bill on the ground that the plaintiffs could not proceed to establish their title by ejectment,

in consequence of the existence of outstanding terms, which would present a legal bar to such a proceeding. The appellant contended in argument that, in such a case, the only proper relief is that the defendants at law should be restrained from setting up the outstanding terms in bar of the plaintiff's title, and so that the decree actually made, directing an issue *devisavit vel non*, was erroneous, and not warranted by the principle or practice of courts of equity.

"I go along with this argument to the extent of saying, that the relief by merely restraining the defendants from availing themselves of the bar resulting from the accident of an outstanding term, is, in general, the most fit and proper relief. Such a course leaves each party at liberty to assert by legal proceedings what is in substance a mere legal right. But I cannot go the length of saying that the Court of Chancery has not the power to direct the legal question to be tried in a different form of proceeding, as, for instance, by an issue, if such a course appears more convenient. Cases may arise where effectual relief would not be given by merely restraining the parties from setting up an outstanding term. Suppose the subject matter of the devise is a mere equitable right, as, for instance, a contract to purchase, or an equity of redemption of a mortgage in fee, when the mortgagee *is in possession;* in these and similar cases it may be impossible to enable the heir to raise the question as to the validity of a will, without doing something more than merely restraining the party claiming under it from setting up an outstanding term in bar to an ejectment at the suit of the heir. It must, therefore, be a matter in the discretion of the court what course shall be taken. And that being so, it would be very inexpedient that this House should interfere with what has been done in the exercise of that discretion, unless it appears that injustice has been, or is likely to be, its consequence. I do not mean to say, that in the exercise of my discretion, if I had been the Judge originally hearing this case, I should have taken the course of directing an issue, instead of merely enabling the heir at law to proceed by ejectment. *Indeed, I doubt whether, if, at the original hearing, the point had been put to the Lord Chancellor of Ireland, as to which of these two courses he would take, he would have made a decree for an issue. I incline to think he would not.* That mode of proceeding did not originate from any suggestion of his, but was proposed at the bar, and acceded to by the Lord Chancellor. If the course taken had been one which the Court had no right to take, then it

may be said the circumstance that it did not originate with the Judge himself, but was adopted in consequence of the suggestion of counsel, could not give it validity. But where either of two courses is open to the Judge, and he in his discretion adopts that which the counsel on both sides approve, it must be a strong case indeed, which should induce your Lordships afterwards to interpose, and say that his discretion was improperly exercised, unless indeed, it appears that some gross injustice has been its result. The question, therefore, is, whether here the consequence of the course taken has been so palpably injurious to the appellant, that although it was adopted with the sanction, if not at the suggestion of her counsel, it ought to be treated by this House as erroneous and so be dealt with accordingly."

In vindicating the course taken by the Court of Chancery the Chancellor used the following language:

"Upon principle the Court must have a discretion to adopt such a course, where it seems expedient, and modern authorities fully bear me out in the view which I have thus taken. (3 Mer., 167, N.)

"In Shewen *vs.* Lewis (3 Mer., 161), reported in a note to Jones *vs.* Jones, Sir William Grant, on a bill by co-heirs impeaching a will, alleging outstanding terms, and praying either an issue or liberty to bring an ejectment, made a decree directing an issue. This was in 1815. A similar course was pursued by Sir John Leach, in Tatham *vs.* Wright (2 Russ. and M., 1); by Lord Abinger, in Middleton *vs.* Sherburne (4 Younge and C. Exch., 356), and by Sir James Wigram, in McGregor *vs.* Topham (3 Hare, 488. 3 H. L. Cas., 132.)

"The demurrer in Jones *vs.* Jones was allowed on the ground that there was no allegation of outstanding terms, nor anything stated affording a ground for equitable relief.

"The same observation applies to Armitage *vs.* Wadsworth (1 Madd., 189), before Sir Thomas Plumer. There the plaintiff, the heir, stated by his bill that his ancestor had died, seized in fee subject only to certain leases, and that since his death the defendant *had got into possession* or receipt of the rents, claiming under a pretended will, and he prayed an issue *devisavit vel non*, or liberty to proceed by ejectment, notwithstanding the lease. To this bill the defendant put in a negative plea, denying the existence of any lease. This plea was

held to be good, and of course, *therefore*, the plaintiff's right to equitable relief was gone.

"I am aware that in Jones *vs.* Jones Sir William Grant said: 'Now, although there may have been instances of issues directed on the bill of an heir-at-law where no opposition has been made to that mode of proceeding, yet I apprehend that he cannot insist on any such direction.' But Sir William Grant did not, as I conceive, mean to say that in granting an issue the Court would be exceeding its jurisdiction, but only that the other course was that which in general it ought, if desired by either party, to adopt.

"And I am confirmed in this by what fell from Lord Eldon in Pemberton *vs.* Pemberton (13 Ves., 290), a case in which an issue had been directed on a bill filed by an heir impeaching a will. There, on motion for a second new trial, Lord Elden said: 'In general cases this Court, as it cannot try the validity of a will, sends that to be determined by the proper tribunal, and afterwards does what is right The habit in doing this has been merely to direct the heir to bring his ejectment, providing that the defendants shall not set up at law a term satisfied or unsatisfied; and, those obstacles being removed, and a trial had in that way under the control of a court of law, they come back for the account, the deeds, et cetera, which course leaves all the encumbrances just as much encumbrances as if the possession had not been changed. There is great convenience in giving relief in that shape rather than by directing issues, for certainly the question whether a new trial should or should not be had is discussed with much more satisfaction in the court where the trial was had, than in the court out of which the issue was directed.' I cannot interpret this language as meaning anything else than this: that the usual and generally more convenient practice is to enable the heir to proceed by ejectment, but that it is open to the court to direct an issue, if from any cause that course appears desirable."

From this it would seem clear that had the question of want of jurisdiction been made in the outset, it would have been sustained, and the Chancellor's allusion to the case of Jones *vs.* Jones, 3 Mer., 161, is with evident approval. In that case, although there was a prayer that the devisee be restrained from setting up outstanding terms, there was no allegation that there were any outstanding terms which might

be set up, and on this ground the demurrer was sustained by the Master of the Rolls, Sir William Grant. It may, therefore, confidently be repeated that the true rule is as hereinbefore stated, namely, that in order to ground the jurisdiction of equity in respect of the question of will or no will, the heir-at-law must go into court primarily, whether really or only by way of pretense, for the purpose of preventing the setting up of some existing bar to an action of ejectment, and when the court obtains jurisdiction upon such ground it may, in accordance with the familiar principle, retain jurisdiction of the cause for all purposes, and as an incident to the exercise of its jurisdiction direct an issue of *devisavit vel non;* and no case has been found in which the naked question of will or no will was proposed to a court sitting in equity.

In the case at bar, as already pointed out, there is no prayer aimed at a supposed bar to an action of ejectment and none prays an issue, and the scheme of the bill, by which the prayer for general relief is to be measured, does not even hint at either of those features. And had the bill alleged the existence of the outstanding legal estate as a bar to an action of ejectment, such allegation would be directly met by the case of George's Creek, &c., Company's lessee *vs.* Detmold, 1 Md., 225, wherein the court held that where the outstanding title is not such that the person in whom it is vested might recover against either party to the suit, it is no bar to an ejectment. In that case, there was a conveyance of the legal estate to secure bonds, among the trusts being one almost identical with that in the case at bar, namely, that until default by the company it should retain possession, and this was held to entitle the company to maintain ejectment. The opinion of the court, which cites numerous authorities, is clear and convincing, its closing paragraph being as follows: "Upon the whole, we are of opinion under such a mortgage as that in this case that the mortgagor can maintain ejectment against a stranger who rests his defense entirely on possession and an outstanding title in the mortgagee. The time is sufficiently determinable and fixed to make the duration of the demise certain, and the covenant

to hold and enjoy is sufficiently affirmative to bring it within the principle of the cases both in England and in this country."

See also to the same effect Lessee of Fowler *vs.* Whiteman, 2 Ohio State, 270; Hopkins *vs.* Ward, 6 Munf. (Va.), 38.

In closing its consideration of the case of Boyse *vs.* Rossborough, the Court of Appeals, with evident approval and as though the matter were concluded thereby, makes the following quotation from the opinion of the Lord Chancellor (R., 140–1):

"In order to come to a just conclusion on this point, let us consider what was the precise practical difference to the appellant from the adoption of the one course rather than the other. When on a bill, by an heir disputing a will, nothing is done beyond the removal of the legal impediments, then the heir brings an action of ejectment against the party in possession claiming as devisee; and assuming the heirship of the plaintiff to be, as it was in this case, admitted, the defendant begins at the trial, and adduces his evidence in support of the will. The heir then meets this case by such evidence as he can bring to impeach the will. The defendant replies, and the jurymen give their verdict. Precisely the same thing happens on an issue *devisavit vel non.* So far, therefore, as the trial is concerned, it is of no importance which course is taken. Supposing the verdict to be against the will, and there is no motion for a new trial, then, if the proceeding was by ejectment, the heir obtains possession by virtue of a writ of *habere facias possessionem.* If the course taken was to direct an issue, then the Court of Chancery causes possession to be given to the heir. In either case the devisee is compelled to *give up possession* to the heir; and whether this result follows from one species of process or another cannot be material. If the result of the trial is different, and the verdict is in favor of the devisee, then whatever course was taken for the purpose of trying the validity of the will, the bill of the heir will be dismissed, and the devisee *will retain possession.*"

The short answer to this very lucid, and from an English viewpoint, doubtless satisfactory statement, is that, if allowed force in this country, it practically nullifies those two sacred provisions of our judiciary act and Constitution to the effect that

the equitable jurisdiction of our courts shall extend to no case where there is a plain, adequate and complete remedy at law (R. S., Sec. 723), and that in suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved. (Const. Amends., Art. VII.)

Indubitably, the hypothesis of the English cases is that the jurisdiction of chancery is, in form at least, invoked to aid in, or remove an impediment to, an action of ejectment. This is clearly recognized by the Court of Appeals of Maryland in the opinion of Alvey, C. J., in Chase *vs.* Winans, 59 Md., 480, quoted by Mr. Justice Barnard of the Supreme Court of the District of Columbia (R. 118, *f.* 226), as follows:

"There has been no exception to the exercise of jurisdiction by a court of equity in this case. But it is proper for us to say, in order that this case may not be regarded as a precedent for the exercise of jurisdiction in such cases in the future, that *it is no part of the ordinary jurisdiction of a court of equity to revise and correct the probate of wills.* In regard to wills of real estate, if formally executed according to the requirements of the statute, unless it be in the case of trusts or equitable estates, *or there be some legal impediment to the party's right to maintain an action of ejectment,* such party must assert his right in an action at law."

It is unanswerable that if, in the absence of some special ground upon which the jurisdiction of equity may be invoked, a court of equity may undertake to "revise and correct the probate of wills" or to set them aside, it may at one blow invade the jurisdiction of the common-law courts and cancel the *right* of trial by jury: for granting issues is a matter of discretion with the Chancellor, and not a right which may be insisted upon by any of the parties before him; and the test of a right is, in every case, whether it may or may not be *demanded;* if the former, the thing desired is a right, if the latter, it is not.

And, as already pointed out, the only parties in this case who, on the appellee's own contention, could bring an ejectment are the trustees holding the legal estate, and they are not parties to the cause; wherefore the only possible pretext

that could be advanced for the entertainment of this cause by a court of equity, namely, the necessity of its aid in respect of an action of ejectment, is wholly wanting. And, of course, if the appellee can not bring an ejectment, will or no will, as the fact is according to her own contention, she has no possible standing in a court of equity.

The position here taken, that equity will not entertain jurisdiction of a bill to avoid a will, seems settled by the decisions of this court in the case of *Broderick's Will* (21 Wall., 503), and Gaines *vs.* Fuentes (92 U. S., 10). These cases are copiously annotated in 8 Rose's Notes on U. S. Reports at pages 461 and 760.

It is true that in the former case the statutes of California, giving to the Probate Court the same jurisdiction as to wills of both real and personal estate, are referred to, but the reasoning of the opinion is wholly independent of those statutes, many English cases being cited and distinguished. And while in the latter case it was held that a court of equity might entertain a suit to annul a will as a muniment of title, the former case was cited with approval (p. 21), and the very important fact noted that the suit (Gaines *vs.* Fuentes) "must be treated as brought against the devisee by *strangers to the estate* to annul the will as a muniment of title, and to restrain the enforcement of the decree by which its validity was established, so far as it affects their property" (p. 17); and, moreover, the decision, as to the point under consideration, clearly rested upon the fact that by the law, "either customary or statutory," of Louisiana, where the case arose, such a suit could be brought in the courts of ordinary jurisdiction of that State (pp. 20, 21).

Among the many cases cited in Rose's Notes (*loc. cit.*) may be noticed the following:

Belton *vs.* Summer, 31 Fla., 139, 146;
Luther *vs.* Luther, 122 Ill., 558, 563–5;
Wheeler *vs.* Wheeler, 134 Ill., 522, 525–6;
Jele *vs.* Lemberger, 163 Ill., 338.

All these cases hold that, independently of statutes authorizing it, courts of equity have not, under their general chancery powers, jurisdiction to entertain a bill to set aside a will or the probate thereof, and that in every case both the extent of the jurisdiction and the manner of exercising it are measured and controlled by the terms of the statute.

The principle announced in the case of Broderick's Will has never been departed from by this court, and, on the contrary, is emphatically restated in Ellis *vs.* Davis (109 U. S., 485), which case also shows conclusively that the decision in Gaines *vs.* Fuentes rested upon the law obtaining in the State of Louisiana.

In Ellis *vs.* Davis this court said (pp. 494–5):

"It is contended, however, for the appellants that the bill ought to have been maintained, for the purpose of decreeing the invalidity of the will of Mrs. Dorsey and annulling the probate, so far, at least, as it gave effect to the will as a muniment of title.

"It is well settled that no such jurisdiction belongs to the circuit courts of the United States as courts of equity, for courts of equity, as such, by virtue of their general authority to enforce equitable rights and remedies, do not administer relief in such cases. The question, in this aspect, was thoroughly considered and finally settled by the decision of this court in the case of *Broderick's Will* (21 Wall., 503, 88 U. S., XXII, 599). It was elaborately considered and finally determined in England, by the House of Lords, in the case of Allen *vs.* McPherson (1 H. of L. Cas., 191). In that country it was undoubtedly the practice of the courts of chancery to entertain bills to perpetuate the testimony of the witnesses to a will devising lands, at the suit of the devisee against the heir-at-law, it being alleged that the latter disputed its validity; and this, as Blackstone says (3 Bl. Com., 450), "is what is usually meant by proving a will in chancery." It is also true that a bill in equity, in the nature of a bill of peace, or *quia timet*, would lie at the suit of a devisee against the heir-at-law, in which, the validity of the will having been sustained by the verdict of a jury on the trial of an issue *devisavit vel non*, a decree might be passed establishing the will and the title of the devisee under it, and perpetually enjoining the

heir-at-law from setting up any claim of title against it. (Story, Eq. Jur., Sec. 1447.) The heir-at-law, it was formerly held, was not entitled to file such a bill, for he could bring his action of ejectment, and thus had his remedy at law; although such a bill would be entertained, if not objected to, or if there were any impediments to the proper trial of the merits on such an action (Bootle *vs.* Blundell, 19 Ves., 494). The modern rule is 'that the usual and generally more convenient practice is to enable the heir to proceed by ejectment, but that it is open to the court to direct an issue, if from any cause that course appears desirable' (Boyse *vs.* Rossborough, 6 H. of L. Cas., 1–42). The manifest ground on which courts of equity in England proceeded, in declining the jurisdiction in question, was that, as to wills of personalty, the jurisdiction of courts of probate was exclusive, and that, as to devises, the remedy at law was plain, adequate and complete. In this country, from a time anterior to the adoption of the constitution, the same distinction of jurisdiction has existed, all probate and testamentary matters having been confided either to separate courts of probate, under different denominations, or a special jurisdiction over them having been vested in courts having jurisdiction also over other subjects."

2. The question next arises, What is the effect of the stipulation in the case?

The meaning of the stipulation has been clearly misapprehended. It is to the effect that, notwithstanding the pendency of the demurrers, the court might certify issues for trial by a jury, the jury's findings to be returned to the court sitting in equity, a decree to be entered in accordance with the findings, and all rights of appeal as in cases of issues from the Orphans' Court to be reserved. (R., 126.)

Of this stipulation two things are to be observed.

A. If it meant to give the court a jurisdiction which it did not possess, it is utterly nugatory, as, upon principle and by the unanimous agreement of all the authorities, consent cannot confer jurisdiction.

B. If it meant only to try the question of fact involved and to save the questions of law for a higher court, it was an

excusable and, indeed, commendable effort to shorten the litigation by having the whole case revealed in the outset, so that but one journey might be taken to the court of last resort, which would thereby be put in position to dispose finally, once for all, of the whole case.

That this latter is the true meaning of the stipulation would seem beyond doubt. It is not agreed that the demurrers should be withdrawn or waived; it is not agreed that the decree to be made on the findings should be final; it is not in either form or effect a submission to arbitration, as was the case in Strong *vs.* Willey, 104 U. S., 512, cited by Mr. Justice Barnard (R., 120); it expressly saves the right of appeal as in cases from the Orphans' Court, all which appeals lie to the Court of Appeals and not to another judge of the Supreme Court of the District of Columbia; and in terms it is silent as to an appeal from the decree to be entered on the findings, the right to which appeal could not be waived except expressly or by unavoidable implication. Clearly it was the contemplation of this stipulation, not that the parties should stop in the court of first instance, but that they should take a verdict on the facts, subject to the ultimate judgment of the law as to the respective legal rights of the parties.

Viewed thus, the stipulation is of no importance if the judgment of this court be that the court sitting in equity had no jurisdiction to begin with. If the view of the court be the other way, the stipulation requires further brief notice.

In its most unfavorable aspect for the appellee, the stipulation merely provided for issues out of chancery, for there could be no sense in providing in one and the same breath for a decree on the findings and an appeal from the proceedings resulting in the findings. As the court will assume that the parties did not intend to do a vain thing, namely, stipulate a jurisdiction where none existed; and as, further, the opposite construction would strip the appellant of his clear legal right to an appeal, the court will, in equity and good conscience, give the stipulation the construction here contended for, especially seeing that

by so doing no legal rights of any of the parties are invaded or in any wise impaired.

If, then, the stipulation were in effect for issues out of chancery, the result on those issues is to be dealt with accordingly; and this court, as the court of ultimate appeal in the premises, has the clear right to consider those issues and the findings thereon and the testimony on which those findings were based. If this be done, the appellant has no fear of the result, as appears from the consideration of the testimony hereinafter given; and that this court may and should examine and consider the issues and findings is clear from the case of Boyse *vs.* Rossborough, so much relied on.

The learned Justice of the Supreme Court of the District of Columbia, in his opinion, after referring to the demurrers, and the contention that they had kept the point of jurisdiction continually before the court, said (R., 120):

"The agreement to send issues to the jury and the appearance of parties and trial of those issues before the jury would seem to waive the objections to that method of procedure and might estop the parties from again returning to it if the verdict was unsatisfactory to them, even if the court's jurisdiction was doubtful. I need not, however, go that far in this case, for reasons already stated, and I hold that under the facts of this case it is too late for the defendants to be allowed to say that the manner chosen of having a jury trial to determine the question of will or no will is not lawful. (Strong *vs.* Willey, 104 U. S., 512, 515.) *The court having jurisdiction for some purpose*, and the parties consenting to have the issues tried by a jury, and actually and earnestly trying the same, I think they must now be bound by such procedure."

The Court of Appeals adopted this view (R., 141), notwithstanding that it manifestly begs two questions, namely, (1) *did* the court have jurisdiction for *any* purpose? and (2) did the parties consent to have "the question of *will or no will*" determined, as Mr. Justice Barnard puts it, or the "*validity* of the will tried," as the Court of Appeals puts it? To the contrary, it is earnestly contended that the jurisdiction of the

court for any purpose in the case has not been vindicated, and the parties by their stipulation consented only to the finding by the jury of the facts presented by the issues, leaving all else to be determined in orderly judicial procedure.

And if there be any remaining doubt that this is the true construction of the stipulation, such doubt must disappear upon the briefest consideration of the further stipulation of the parties set forth on pages 27 and 28 of the record, and hereinafter printed in full. That stipulation in terms provided that all the testimony and proceedings had on the law side of the court, including the motions for a new trial made by the respective parties, might be produced, read, referred to and considered by the court as part of the record on the hearing on the equity side of the court, and also in any appellate court to which the cause might be carried by either, or any, of the parties. This is so manifestly at variance with the view that the findings of the jury were to be regarded in the light of a final arbitrament of the question of fact that it seems superfluous to add a word of argument on the subject. By this second stipulation, the whole cause—evidence, findings, motions for new trials, and all—was retransferred to the equity branch of the court for consideration by the justice there sitting, a course which would not have been assented to by the parties victorious on the law side of the court, had they for a moment supposed that such construction as they now seek to give to the original stipulation could possibly be given, namely, that its meaning was to take the jury's verdict as a finality, closing the door to any further inquiry into the facts, and closing the ears of the court to the motions for a new trial.

The case of Strong *vs.* Willey, above cited, calls for passing notice.

In that case, Willey filed a bill against Strong in 1874, which Strong answered, and in 1875 Strong filed a bill against Willey, who in turn answered. "The matters arising upon these bills of complaint were by the respective complainants referred to the arbitrament of William B. Webb under a stip-

ulation that his decision was to be final and conclusive upon all questions arising in the investigation of the cases; that the court should make a final decree based upon his report, and that no exception should be made thereto" (p. 513).

"Pursuant to this agreement, the reference was formally ordered" (page 514). A decree having been entered in accordance with the report of the arbitrator, Strong afterwards filed bills of review which were dismissed on demurrer, and he appealed.

The only questions before the court are shown in the following statement in the opinion: "It is now contended that this decree is erroneous, because (1) it does not dispose of the issues raised by the bills; and (2) it is for a sum in excess of that claimed by the appellee in his original bill" (p. 514). But notwithstanding that the effect of the arbitration was not before the court, the court used of it the following language (p. 515): "The reference of the matter in dispute to the arbitrator coupled with the agreement that his award should be made the basis of a decree in the suits is clearly a waiver of the objection that the remedy was at law and not in equity, if any such objection in fact existed, which we are by no means inclined to admit. The case is to be decided upon the face of the original record, and not upon the averment of new facts in the bills of review."

Very clearly this is not a decision to the effect that a stipulation may confer jurisdiction where none exists, and even if it were so, it would be manifestly a *dictum*, as no question was raised or presented as to the effect of the stipulation. But, however this may be, all possible applicability of what the court said on this subject to the case at bar is nullified by the simple fact, that in the case of Strong *vs.* Willey, the stipulation between the parties was the strongest conceivable, being, as above pointed out, that the arbitrator's finding should be final and conclusive, and that neither of the parties should take any exception thereto. How different this is from the stipulation in the case at bar is self-evident and calls for no further comment.

3. It remains to consider whether the verdict of the jury on the issues submitted is sustained or justified by the evidence.

A. Before, however, taking up this question on its merits, it will be well to dispose of a misconception by the Court of Appeals as to the status of the case at the final hearing before the equity court. That court in its opinion (R., 141) says: "In this case, no motion for a new trial was made to the court of equity upon the return of the verdict to that court upon the issues framed by it."

This statement raises *in limine* a question as to the character of the record which must be before the Equity Court in order to entitle a party to complain of the findings of a jury upon issues sent by the Chancellor to the law court for trial.

In Watt *vs.* Starke, 101 U. S., 247, Mr. Justice Bradley, speaking for the court, cited the case of Johnson *vs.* Harmon, 94 U. S., 371, to the effect that a bill of exceptions cannot be taken on the trial of a feigned issue directed by a court of equity; or, if taken, can only be used on a motion for a new trial before the law court, and said:

"We are still of that opinion for the reasons then stated. * * * Where a Court of Chancery suspends proceedings in a cause, in order to allow the parties to bring an action at law to try the legal right, it does not assume to interfere with the course of proceedings in the court of law, and a motion for a new trial must be made to that court; but, *when it directs an issue to be tried at law*, a motion for a new trial must be made to the Court of Chancery; and, *for that purpose*, the party applying for a new trial must procure notes of the proceedings and of the evidence given at the trial for the use of the Chancellor. This is done either *by having the proceedings and evidence reported with the verdict*, or by moving the Chancellor to send to the judge who tried the issue for his notes of trial; or procuring a statement of same *in some other proper way*. The Chancellor then has before him *the evidence given to the jury*, and the proceedings at the trials, and may be satisfied, by an examination thereof, that the verdict ought not to be disturbed. The evidence and proceedings then become *a part of the record*, and go up to the Court of Appeal if an appeal is taken."

The record shows that the appellant entered into a stipulation which on its face shows its purpose to, "in some proper way," present to the Chancellor the whole case—proceedings, evidence, findings, etc—for his consideration on the final hearing. That stipulation is as follows:

"It is hereby stipulated by and between the parties to this cause that the stenographic report of the testimony and proceedings had on the trial of the above stated issues before Mr. Justice Cole and a jury, and reported by R. S. Boswell, as appears by his affidavit annexed to said report dated the 26th of February, 1900, may, *together with the motions for a new trial* made by the respective parties and the order of the court made in this matter, appearing in Minutes 40, page 176, of the records of the court, and also any other and all orders and proceedings passed or had herein, be produced, read, and referred to *and considered* by the court *as part of the Record* on the hearing in the Equity Court of this case and by any *appellate* court to which said cause may be carried by either or any of the parties, etc." (R., 27.)

Notwithstanding the provision that all the proceedings, "together with the motions for a new trial" might "be produced * * * and considered by the court as part of the record on the hearing in the Equity Court," etc., it seems to have been the opinion of the Court of Appeals that a *written* motion for a new trial should yet have been made and filed in the Equity Court in addition to that filed in the law court and set forth in the record at page 129.

The Equity Court (Mr. Justice Barnard) seemed, however, to consider the stipulation as sufficient to bring before him the whole case—evidence, findings, and everything else—as fully as if another and separate motion for a new trial had been filed in his court; and the appellee also must have so regarded it, for no objection or suggestion to the contrary appears in the record. Indeed, the decree (R., 121) expressly recites that—

"This cause having come on to be heard by the court, and having been argued by the solicitors for the respective parties,

and the bill, answers, demurrers, exhibits, proofs, stipulations and other proceedings having been read and considered by the court, it is therefore adjudged * * * that the verdict of the jury * * * be and the same is hereby ratified * * * as the judgment, decree and *conscience* of this court."

All this should surely be sufficient to show that the case was before the Chancellor *as on a motion for a new trial*, and was so regarded by all the parties as well as the court.

In the case in 101 U. S. (Watt *vs.* Starke, above cited), the court, in its opinion, says:

"In the case of Watkins *vs.* Carlton (10 Leigh., 560), the Court of Appeals of Virginia held, as we do, that the *whole* proceedings [which, of course, would include the motion for a new trial] in the Court of Law, upon an issue directed out of Chancery for the purpose of ascertaining a particular fact, are part and parcel of the Chancery cause; and that the court, if required, must certify any instructions given to the jury; inasmuch as the Chancellor has the right to see the whole proceedings. In that case a bill of exceptions was taken, it is true; but the case was considered *as upon a motion for a new trial*."

It is clear that the case at bar was thus considered by the Equity Court. This statement, therefore, by the Court of Appeals, that "no motion for a new trial was made to the Court of Equity," can serve no purpose unless it be to have it understood that the appellant had in some way deprived himself of the right to have the evidence, together with the findings of the jury thereon, considered and passed upon by the Equity Court, as fully as if a written motion for a new trial had been made to, and filed in, that court; a position which, in view of the authorities, and of the stipulation and the understanding and action of all the parties, as well as the Equity Court itself, is not at all tenable.

Indeed, from the view taken by this court in Johnson *vs.* Harmon, 94 U. S., 371, of the force and effect of the jury's findings, it is difficult to conceive when and under what circumstances, if ever, a formal motion for a new trial of issues

sent to a law court is necessary to be made to the Chancellor when the findings have been certified to him by the law judge. The duty of the Chancellor when the whole case, including the proceedings which have been had in the law court, is before him for final decree, is to pass such decree as the entire record, including the evidence taken upon the feigned issues, justifies. He may ignore entirely the jury's findings if, in his opinion, they are not justified by the evidence, and make a decree directly in conflict with them; or, he may, if he think proper, send the case back for a new trial in order that further evidence may be "collected," as it is expressed by Lord Eldon. Thus in the case just cited (Johnson *vs.* Harmon, *supra*), it is said:

"The issue is directed for the purpose of informing the conscience of the Chancellor and aiding him to come to a proper conclusion. If he thinks the trial has not been a fair one, or for any other reason desires a new trial, it is in his discretion to order it. But he may proceed with the case, though dissatisfied with the verdict, and make a decree contrary thereto, if, in his judgment, the law and the evidence so require. A decree in equity, therefore, when appealed from, does not stand or fall according to the legality or illegality of the proceedings on the trial of a feigned issue in the cause, for the verdict may or may not have been the ground of the decree. It is the duty of the court of first instance to decide upon the whole case—pleadings, evidence and verdict—giving to the latter so much effect as it is worth. *An appeal from the decree must be decided in the same way*, namely, upon the *whole* case."

The case, then, was before the Equity Court "as on a motion for a new trial," and was so considered by it; but whether it was or not is immaterial, so far as the hearing before the Court of Appeals was concerned. If the Equity Court failed, as it did, to appreciate its power over the findings of the jury, that is a reason why the Appellate Court should all the more have considered the case as this court has pointed out, viz: the *whole* case, and pass upon the effect of the *evidence*, not of the findings, which were simply advisory. That neither the Equity Court nor the Court of Appeals did this we shall presently

see, and this is important to be ascertained, because we have come to this court to obtain that consideration of the whole case to which we are entitled, and which it has not yet received.

B. We pass on to consider the effect given to the jury's findings by the court below.

An examination of the opinion of the chancellor who heard the case in the Equity Court easily discloses that he largely overestimated the effect of the jury's findings, and gave to them a force which they have been denied by the authorities just cited. Thus he says:

* * * "Where the parties have agreed that a decree shall be entered in accordance with the findings of the jury, it may be doubtful if the parties can be heard or be allowed to ask the Court to *disregard the verdict* unless some material error has been committed on the trial. Looking at the case from every standpoint, I have reached the conclusion that the verdict was one which the evidence warranted the jury in finding. * * * The witnesses were before them, and a motion for a new trial was argued and considered there, and the Justice presiding was satisfied that the verdict was warranted by the evidence; otherwise, he would have vacated it." (R., 120, *f.* 230.)

This language shows clearly that the learned Justice was largely influenced, if not entirely controlled, by the answers which the jury gave to the interrogatories submitted to them; in other words, he gave the answers practically the same effect, if not more, that a judge sitting in a common-law cause gives to a verdict; but we know that this is not the measure of consideration to be given by the Chancellor to the answers of a jury in a case where issues have been sent to the law court to be tried. In a common-law case, though the trial judge may differ with the jury as to what the verdict should have been, he is, nevertheless, bound to sustain it if the evidence "warranted it" in the legal sense; for the trial judge will not, merely because he cannot agree with the jury, substitute his opinion for their verdict if there be any evidence to sustain

the latter. The Chancellor, on the contrary, as we have seen, may disregard the findings when he is not satisfied with them; otherwise, the mind of the jury is substituted for the conscience of the Chancellor. Thus in Watt *vs.* Starke, *supra*, in addition to what has already been quoted from that elaborately considered case, we find the following clear and explicit enunciation of this doctrine:

"In Bootle *vs.* Blundell, 19 Ves., 500, Lord Eldon said:

"'If this court thinks proper to consider the case upon the record as fit to be governed by the result of a trial, the review or propriety of which belongs to a court of law, the opinion of a court of law is sought in such a form that it is regarded as conclusive, whether the judgment is obtained upon a verdict or in any other shape; but, *upon an issue directed*, this court reserves to itself the review of all that passes at law; and one principle on which the motion for a new trial is made here, and not to the court of law, is that this court regards the judge's report with a view to determine whether the information *collected* before the jury, together with that which appears upon the record of the court, is sufficient to enable it to proceed satisfactorily, to which it did not consider itself competent previously. And, in another case before the same judge, Barker *vs.* Ray (2 Russ., 75), he said: In considering whether, in such a case as this, the verdict ought to be disturbed by a new trial, allow me to say that this court, in granting or refusing new trials, proceeds upon very different principles from those of a court of law. Issues are directed to satisfy the judge [Chancellor], which judge is supposed, after he is in possession of all that passed upon the trial, to know all that passed there; and looking at the depositions in the cause, and the proceedings both here and at law, he is to see whether, on the whole, they do or do not satisfy him. It has been ruled over and over again, that if on the trial of an issue, the judge reject evidence which ought to have been received, or receive evidence which ought to have been refused, though in that case a court of law would grant a new trial, yet, if this court is satisfied, that if the evidence improperly received had been rejected, or the evidence improperly rejected had been received, the verdict ought not to have been different, it will not grant a new trial merely upon such grounds.

"'It is difficult to see how the matter could be made more clear than it is here put by Lord Eldon, whose familiarity with

Equity Practice and Pleading has probably never been surpassed. * * * The reason of the practice is obvious; the verdict of a jury upon an issue out of chancery is only *advisory* and never conclusive upon the court. It is intended to inform the conscience of the Chancellor. It may be disregarded and a decree rendered contrary to it. * * * But in all cases where the verdict is brought in question it is necessary that he be made acquainted with what passed at the trial, including as well the evidence given as the rulings of the court, in order that he may exercise *his own* judgment in the matter.'"

We commend the whole of this opinion, as a fully considered expression of the views of this court upon the effect of the findings of a jury upon issues sent to it out of chancery, and the duty of the Chancellor when those findings are returned to him.

The justice holding the Equity Court gave to the jury's findings a very different and a much higher value than that which this court has attributed to them. He gives counsel to understand that he doubts whether he has the power to reject these answers, and he builds his doubt upon the fact that "the issues were not sent to the law court *on his own motion*," and also because "the parties have agreed that a decree shall be entered in accordance with the findings of the jury." Yet it would seem to be plain that even if the stipulation had been intended, as clearly it was not, to overrule the law and practice and *conscience* of the court, the parties, nevertheless, did not agree that these findings should, *in any event*, become the decree of the court; that is to say, however contrary to the evidence, or inconsistent with each other, they might be, or however much the verdict may have been brought about by menacing a "hopelessly divided" jury (as we shall hereafter see) with threat of confinement to the jury room from Friday afternoon until Monday morning, if they did not agree, and by suggesting to them also the pleasant alternative that they would "be at liberty" as soon as they did agree. Nor did the parties agree that however misleading the law judge's instructions to the jury might be they were to be bound irrevocably by them. By no reasonable construction of the stip-

ulation, therefore, can it be held that the findings, however obnoxious they might be to every one of these objections, should remain unchallenged and unchallengeable and become the declared conscience of the Chancellor. We do not say that Mr. Justice Barnard held this view, but we do say that his view of the effect of the stipulation prevented him from seeing, or, perhaps it is better to say, from looking for, anything in the proceedings or in the evidence that would warrant him in refusing to accept these findings as the conscience of the Chancellor. These obnoxious features were pointed out to him, as well as to the Court of Appeals; but our efforts failed to impress either of them.

It is not a matter for surprise, therefore, that after having devoted nearly his entire opinion to considering whether the court had jurisdiction to entertain the bill, and having come to an affirmative conclusion on that point, the question—and by far the most important question to the appellant—as to the effect of the evidence to establish the findings, was not considered at all, except to say that "the witnesses were before them [the trial judge and the jury] and a motion for a new trial was argued, and considered there, *and the Justice presiding was satisfied* that the verdict was warranted by the evidence, otherwise, he would have vacated it." (R., 120, *f.* 230.) This, of course, is equivalent to saying that the conscience of the Chancellor ought to be satisfied *if* the trial judge and the jury were satisfied; but that, as we have seen, is a well-decided *non sequitur*.

The Court of Appeals fell into the same error. In its opinion, we meet with similar proof of the method adopted by it in weighing and measuring the evidence which was collected at the trial of the issues. The learned Chief Justice, delivering the opinion of the court, after devoting four and a half pages of the record to an industrious consideration of the jurisdictional question, summarily disposes of the evidence by dealing with it as if the court were sitting in a common-law case. He says:

"The justice before whom the issues were tried at law, as well as the justice in the Court of Equity, were entirely satisfied with the verdict. The trial in all respects seemed to have been fairly conducted. The jury were fully and fairly instructed by the court at the instance of the respective parties, and all the prayers offered by each side were granted, read and fully explained to the jury. We can perceive no substantial ground upon which the verdict should be set aside and a new trial upon the issues granted." (R., 141.)

This shows that what was in the mind of the Court of Appeals was, not whether the decree rendered by the Equity Court was sustained by the evidence, but whether the issues were "fully and fairly" tried by the law judge, and, having found (erroneously, as we insist) that they were so tried, it deemed that the court's plain and only duty was to affirm the decree of the Equity Court.

It is respectfully but earnestly submitted that the Court of Appeals misconceived its duty in this respect. The real, indeed the only, issue on this point raised by our appeal was: Does the evidence support the findings that "fraud, circumvention or undue influence" had brought about the making of Mary Beyer's will? Of course, if, in the opinion of the court, the evidence hangs evenly in the balance, so as to make the question of undue influence a doubtful one, the fact that the case was not fully and fairly tried might be a factor in influencing the court to direct a new trial; but if, in its opinion, the whole evidence fails to establish that the will was secured by improper influences, then it will be immaterial what were the rulings of the trial judge. This, we submit, is the true doctrine, as explained by Lord Eldon and clearly set forth by this court in Watt *vs.* Starke and Johnson *vs.* Harmon. As was said in the last-named case:

"A decree in equity when appealed from does not stand or fall, according to the legality or illegality of the proceedings on the trial of feigned issues in the cause."

And, as the court proceeds to explain, the granting of a new trial is entirely discretionary with the Chancellor. His

refusal to grant it, no matter how erroneous the rulings of the law judge, is utterly immaterial to the appellate court if, on the whole case, including the evidence, the Chancellor has made such a decree as the appellate court thinks should have been made.

"It is the duty of the court of first instance [i. e. the Equity Court] to decide upon the whole case, pleadings, evidence and verdict, giving to the latter so much effect *as it is worth.* An appeal from the decree *must be decided in the same way.*" Johnson *vs.* Harmon, *supra.*

Again, the Court of Appeals says:

"As there was no other evidence in the case than that upon which the jury acted and based their verdict, if the court below was satisfied, as it appears to have been, that the verdict was the fair result and conclusion from the evidence, the Court was certainly justified in accepting and adopting the verdict and making it the basis of the decree." (R., 114.)

Thus the Court of Appeals rests its decision, not upon the result of the evidence, but upon the fact that the Equity Court would not have made the decree it did if it had not been satisfied "that the verdict was the clear result and conclusion from the evidence;" and the Equity Court in turn made the decree it did because the law judge "was satisfied that the verdict was warranted by the evidence." Now, since the law judge was satisfied with the evidence because the jury were satisfied with it, it follows that, instead of the decree of the Court of Appeals being based upon *its own* examination of the evidence and proceedings in the case, it rests it upon the fact that the jury found as they did, and that, *therefore*, the findings ought not to be disturbed—and the jury, as we shall see, found as they did (if they were not coerced into an agreement), because the law judge permitted them to accept as the basis of their findings the incoherent and unsupported testimony of an ignorant servant girl as to isolated facts of doubtful relevancy. With the highest respect for the Court of Ap-

peals we submit that this is a complete begging of the question all around the circle of Chancellor, judge and jury.

From what has been said we think we are now justified in asserting that the error in the decree at bar is to be traced to the fact that both the Equity Court and the Court of Appeals seemed to regard the jury as the final arbiter of the facts, and that the court's duty was fully performed when it found the facts to "*fairly* support the verdict," the word "fairly" being used in the sense in which it would be used by a common-law judge. There are a number of like expressions to be found in the opinion of the Court of Appeals pregnant with the suggestion that it deemed its functions limited by the findings of the jury, and that it was the duty of the Chancellor to be "satisfied," as a law judge would be satisfied, when he finds any evidence, however slight, to support the verdict. Thus we find the expression: "The evidence taken at the trial of the issues would seem to have been *eminently proper for the consideration of the jury*" (R., 141); that is the language of a judge, not of a Chancellor, whose duty it is to examine the whole evidence himself to see whether it is satisfactory to *his* conscience without regard to what the jury may have thought about it. (See record, page 141, for other expressions of like import.)

What end is to be gained by an appeal if the appellate court bases its affirmance on the fact that the court below was satisfied with the decree appealed from? That is the reason an appeal is taken. If the court below had not been satisfied with its decree it would have vacated it itself.

We come, then, to this court, sitting *pro hac vice* as a Court of Chancery, and ask it to examine this case upon the principles heretofore laid down by it in like cases, and not to rest its decision upon the ground that two lower courts have decided the case upon its merits, and, therefore, this court will not disturb it. Our case has not only *never* been decided, but has never even been *considered*, upon its merits. But, even if it had been, the court will find in the decision of the court below that clear erroneousness which led it in Baker *vs.* Cum-

mings (169 U. S., 189–198), to reverse the decree notwithstanding that two lower courts had found for the plaintiff. Moreover, this court, if not forbidden by its own declarations in cases of this sort to substitute for its conscience the conscience of the two courts below, may not do so in the case at bar, for the reason that neither of the courts below has, as we have seen, applied its conscience to the evidence in this case. This court must, therefore, examine the whole case for itself before it can say that the decree below was justified by the weight of the evidence. When such an examination shall have been made we feel confident that it will never be declared as the conscience of this court that the will of Mary Beyer was procured "by fraud, circumvention, or undue influence practiced or exercised upon the said Mary Beyer by Louis Beyer, Jr., Helen B. Johnson, or by either of them, or by any other person."

C. Deeming that the court will follow the rule it has heretofore so explicitly announced, by examining the evidence for the purpose of satisfying its own conscience as to what the decree should be, we now proceed to render it what assistance we may by a consideration of the merits of the case.

(1) General Statement of the Facts.

Mary Beyer, the testatrix, at the time of her death was sixty-five years of age, and the wife of the appellant, Louis Beyer, Sr. They had been married many years but had no children. The title to the only real estate they possessed stood in the wife's name. It consisted of a lot of ground improved by the house in which they resided, and six other houses erected on the rear end of the lot. The whole was worth about $20,000 or $25,000. The record shows that up to within a short time of her death she, as well as her husband, believed that in that event he would inherit it. Mrs. Helen Johnson, a niece, and Louis Smith, a nephew (known as Louis Beyer, Jr., and so called in the record), were the children of a sister of Mary Beyer. This sister died when the children were very

young and Mrs. Beyer and her husband had practically adopted them, the boy taking Mr. Beyer's name. Learning some few months before her death that her property would descend to neither her husband nor her adopted children, she determined to make a will; and desiring that the property should remain to her husband and them, she decided to leave it to young Beyer, knowing, as she told him, that he would comply with her wishes in regard to her husband and his sister Helen. Sometime afterwards, having taken to her bed with what proved to be her last illness, she directed Louis Beyer, Jr., to send for a lawyer to draw up her will. He first suggested a Mr. Nauck, but Mrs. Beyer for some reason objected to him, and then a Mr. Brennan's name was suggested and she assented. Mr. Brennan was a lawyer and member of the bar, but did not practice in the courts, giving his time to the affairs of the Cranford Paving Company of this city, of which company he was vice-president. Brennan's office was in the same building in which young Beyer was employed. He and Brennan corroborate each other in the statement as to the latter being employed to draft the will and see to its execution. Brennan testifies that he called at Mrs. Beyer's house on the Sunday preceding the 14th day of July, 1900, having first ascertained that a will made on Sunday would be valid; that he was conducted to Mrs. Beyer's room; found her in bed, and stated that he understood she desired him to draw up her will, to which she assented. He then proceeded to take her instructions. She told him she desired to leave the property to Louis Beyer, Jr., having confidence that he would carry out her wishes in regard thereto, which, in substance, was that he and his sister should live in the house with their adopted father and after his death divide the property between them. She explained that she would not leave it directly to her husband because she was afraid he would probably lose it in exploiting his inventions, of which he had a number, and had already lost a good deal of money on them. She gave the attorney the names of her relatives and bequeathed them small legacies, spelling out their names for him.

Brennen then drew up the will at once and called in from the next room Dr. Smith, the family physician, and also a Mr. Sullivan (who had been requested to come to the house for the purpose of witnessing the will), and having read it over to her, asked her if it was her will and if she requested the gentlemen present to witness it for her. She answered affirmatively, and then, having signed it, it was duly attested. Brennan took the will away with him for safe keeping, but on reading it over the next day he discovered that he had made a clerical error in leaving out the word "heirs" in the devise to young Beyer; accordingly on the same day (Monday), he called again on Mrs. Beyer, stating that owing to this mistake it was necessary to re-execute the will. He says that she then told him that as long as it had to be re-executed, she wished to include Mrs. Johnson by name as an equal taker with Louis Beyer, Jr. Brennan accordingly went back to his office, re-drafted the will, and on Tuesday returned, and it was then and there signed and attested by the same witnesses, except Mr. Sullivan, whose place was taken by a Dr. Atkinson. Brennan says that on both occasions Mrs. Beyer was perfectly sound in mind, very intelligent in expressing her wishes, and spoke in an ordinary tone of voice. He is corroborated in this by both Drs. Atkinson and Smith. Brennan took the will away with him and locked it up in his safe. Neither Mrs. Johnson nor young Beyer was in the room at the making of either of the wills. Indeed, on the day of the execution of the last will, young Beyer was down town at his office. Nor did either of them see the will until after Mrs. Beyer's death, nor did they know of its contents except as the son was told by Mrs. Beyer herself.

The husband, Louis Beyer, Sr., never even heard that the will had been made. He learned it only after his wife's death, and was quite displeased with the disposition of the property; believing that he, as head of the family, should control it. There appears to have been some feeling exhibited on his part to his adopted children on this account, the result of which was that the six houses and more than half the ground was

conveyed to him in fee by the two children. They continued to live together in the dwelling house, but in course of time an estrangement grew up and the appellant left the common home and remarried. Nearly three years after the death of Mrs. Beyer, Caroline LeFevre, one of her sisters who had been living all the time in the District, seemed to have suddenly awaked to the determination to file this bill and attempt to "break" the will, and this litigation is the consequence.

(2) The Evidence Upon the Issue of the Mental Capacity of Mrs. Beyer.

It was not disputed that the testatrix executed the will, but her mental capacity was attacked. Only two witnesses testified in behalf of the appellee upon the latter point, viz: Louise B. Stone, niece of the deceased and daughter of the appellee, and Fanny Perry, a colored servant girl in the family of the deceased and about eighteen years of age at the time of the death. Neither of these witnesses ventured to say in so many words that the deceased was not mentally qualified to make a will. They confined their testimony to statements tending to show that she was very sick—a fact not disputed. She was suffering from a malignant abdominal cancer, a disease, as her physician testified, not at all affecting the mentality of the patient until a few days of her death (R. 69). The will was drawn twelve days prior thereto. The evidence is overwhelming, indeed there is none to the contrary, that at the time of the execution of the will Mrs. Beyer was perfectly clear in mind. Such was the testimony of Dr. Smith, Dr. Atkinson, Dr. Selhausen (who saw her a day or two afterwards), Rev. Dr. Facius, her pastor, and her two adopted children; the jury also found that such was her mental condition, and that she knew and understood thoroughly the terms of the will which she herself dictated to the attorney who drew it.

(3) The Alleged Undue Influence.

Considering the ridiculous paucity of the evidence to support this issue, it is difficult to deal patiently with it. Besides

its utter denial by the accused parties, the detailed testimony for the appellant is overwhelmingly to the contrary.

It should be remembered that the issue of undue influence is always so involved and interwoven with the issue of testamentary capacity that proof of the strength and clearness of the testator's mental condition at the time of making the will affords a strong presumption of the absence of all coercive influence.

"While the issue of undue influence is quite distinct from that of testamentary capacity, the two are commonly found united and must be considered together."
27 Am. Ency. Law, 504;
Schouler on Wills, §§ 225–226.

"Some have thought that the exercise of undue influence necessarily presupposes weakness of mind in the testator, and certainly it matters not how ingenious the fraud or how coercive the influence, if there be intelligence enough to detect and strength enough to resist them."
Latham *vs.* Udell, 38 Mich., 238, 242;
Schouler on Wills, §§ 226, 242;
Shailer *vs.* Barnstead, 99 Mass., 112, 121.

"Without such proof [weakness of mind] the issue [undue influence] can seldom or never be maintained."
Ibid., 121.

The witness, Fanny Perry, who was a colored servant girl in the family of the deceased for about two or three years before her death, was the *only* witness offered to support the charge of undue influence. We challenge the learned counsel for the appellee to point to a single circumstance in the testimony of any other witness which can be held to be relevant to such a charge. The girl, Fanny, however, does make a weak attempt to relate, in an incoherent way, certain isolated occurrences which, even if true, would establish nothing, standing of themselves. There was not, however, a solitary witness offered to support, directly or indirectly, her testimony concerning a single one of these occurrences, while, on

the other hand, she was directly contradicted in most of these particulars by both Mrs. Johnson and Louis Beyer, Jr. It should be noted also that her testimony as to the ability of Mrs. Beyer to make known her wishes on the day the will was executed is in thorough conflict with the testimony of the family physician, Dr. Smith, and also of Dr. Atkinson and the attorney, Mr. Brennan, and Dr. Selhausen, who called to see the testatrix the next day, or the day after the will was drawn. The testimony of the Rev. Dr. Facius, the pastor of Mrs. Beyer's church, is also in conflict with her statement. All of these gentlemen say that, while Mrs. Beyer was sick at or about the time the will was executed, she was nevertheless quite able to converse in an ordinary tone of voice, and so clear was her enunciation that Dr. Smith, who testifies that he is very hard of hearing, could hear her distinctly (R., 72, fol. 137). In view of the testimony of these professional gentlemen, what must we say of the credit to be given this "willing witness," Fanny Perry, when she testifies about other matters? She is asked:

"Q. Just state to the gentlemen of the jury and his honor what her condition was on the day that these people came to see her [viz: the day the will was executed].

"A. The day the people came to see her she was very *weak* and she was unable to sit up or to help herself at all. [Note that Dr. Atkinson says she was propped up in bed. R., p. 64.]

"Q. Could she talk? A. She could talk, but not loud. *You had to hold your ear down to her mouth to hear what she had to say.*"

This is the reliable witness upon whose sole and unsupported testimony of isolated and trivial facts, this will is to be set aside as having been procured "by the fraud, circumvention, or undue influence practiced or exercised upon the said Mary Beyer by Louis Beyer, Jr., Helen B. Johnson, or by either of them or by any other person."

What is the testimony of Fanny Perry upon which the appellee relies to establish undue influence? It occupies but very little space in the record. Its incoherency and inconsis-

tency are palpable on its face; but as it is the case, and the whole case, of the appellee, we beg leave to point out to the court how irreconcilable it is with all the rest of the testimony in this record. It begins on page 42:

"Q. Just tell us what occurred, in your own way, on this day that these people came to see her about two weeks before she died?

"A. The day the people came to see her *I was not there;* I had gone home to get ready to go to Sunday school, and Mrs. Johnson came to me to get me to help her to get supper." (R., 43, *f.* 80.)

Observe that she is speaking of Sunday, for she was getting ready to go to *Sunday school.* Now Sunday was the day Attorney Brennan, corroborated by Dr. Smith and Mrs. Johnson and Louis Beyer, Jr., came to the house to make the first will which was afterwards destroyed—a will that left nothing whatever to Mrs. Johnson, and, therefore, could not have been the result of any undue influence exercised by her. The testimony proceeds:

"Q. Mrs. Helen Johnson? A. Yes, sir; Mrs. Stone was there. I was going up into Mrs. Beyer's room, and I met Mr. Louis Beyer in the hall.

"Q. Which Mr. Beyer? A. The young man.

"Q. What was he doing? A. He was going to the room with a pen and ink. He did not allow me to go into the room." (R., 43, *f.* 80.)

Beyer, Jr., testifies (and he is corroborated by Brennan) that he did not enter the room after he left Brennan with Mrs. Beyer, but merely knocked on the door and handed Brennan the pen and ink (R., 80, *f.* 153). Continuing, she says:

"She [meaning, we suppose, Mrs. Johnson] said 'You [meaning, we suppose, Louis Beyer, Jr.] go down stairs, and after you get the wagon hitched up take Mrs. Stone round to the Christian Endeavor Encampment first and then take her home; if she knows what is going on here, she won't leave to night unless she gets a share in the profits.'" (R., 44.)

Now Mrs. Stone herself gives no word of testimony of being at the house at the time when this first will was drawn, and the witness Fanny says that on that day (Sunday) she was not there when "the people" were there; that she had gone home "to go to Sunday school." So that it is evident from her testimony, if it be true, that the will had been already drawn and "the people" had departed or were about to depart when she returned to the house. Why then should Mrs. Johnson tell young Beyer to get Mrs. Stone out of the way since the will *had already been drawn?* She says Mrs. Johnson said, "She [Mrs. Stone] won't leave here to-night unless, &c.," showing that the hour was late when this statement was made, if it ever was made.

"Unless she gets a share of the *profits.*" This is an unlikely expression, and is meaningless, unless it be indicative of invention on the part of the witness.

"Q. How many persons were there on that occasion? A. I do not know exactly the number. I did not *see any of the people* who were in the room, but I know *Mrs. Stone was there.*" (R., 44.)

She had just previously testified that "the day the people came to see her [Mrs. Beyer] I was not there." Now she says she was there, and while she did not see "any of the people" in the room she knows "*Mrs. Stone was there.*" But Mrs. Stone herself does not say that she was there, and had she been she surely would not have omitted to say so, nor would counsel for appellee have failed to bring out the fact. Moreover, Mr. Brennan, Dr. Smith, Helen Johnson and Louis Beyer, Jr., all say that Mrs. Stone was never in the room at any time while the will was being drawn and executed. The testimony proceeds:

"Q. Did you ever hear Mrs. Johnson and Mrs. Beyer talking about a will? A. Yes, sir.

"Q. What did Mrs. Johnson say to Mrs. Beyer, and what did Mrs. Beyer say to Mrs. Johnson?

"A. I have heard [when or where is not said,] Mrs. John-

son ask Mrs. Beyer to make a will, but Mrs. Beyer said she would not make a will; that everything would be left to Mr. Beyer just as it was, and for them to stay with Mr. Beyer and treat him right, and when he died he would do right by them." (R., 44, *f.* 81.)

Of course if every word of this was said it cannot be claimed to be evidence of undue influence, or circumvention, or fraud; and so of the next two questions and answers.

"Q. Did you ever hear any conversations between Mrs. Johnson and Mr. Louis Beyer, Jr., about getting Mrs. Beyer to make a will? A. Yes, sir.

"Q. What were those conversations?

"A. I heard Mrs. Johnson ask Mr. Louis to go and see about getting a will made when she got after Mrs. Beyer to make a will. She asked him to go and see what is to be done if she were to die and the will were not made. He went and I heard him tell her that Mr. Beyer, Sr., and her sisters could come in and take possession of everything. She said then that she would see that a will was made." (R. 44, *f.* 81.)

It was perfectly proper for an adopted daughter to request her mother to make a will; that is not undue influence in any sense. But observe the improbability of the story that Louis Beyer, Jr., went off to find out what would happen if a will were not made, and came back and said *Mr. Beyer, Sr.* (who would have been pauperized if no will were made), would come in *with Mrs. Beyer's sisters* and take everything.

The witness' testimony in chief (so far as it in anyway can be said to relate to the subject of undue influence), then closes with the following:

"Q. Did you hear any conversations after she (Mrs. Beyer), came back from Richmond?

"A. I heard Mrs. Johnson, after Mrs. Beyer was in bed, ask her to make a will. She said she would not make a will, but would leave it to Mr. Beyer [a statement made, if at all, under the impression that he would inherit it]. Mrs. Johnson said, "Yes, you will leave it to him, and he will sink it in a boat or rum mill."

"Mrs. Beyer said, 'Nellie, how can you talk about your Uncle like that?' Mrs. Johnson was after her to make a will and she said she would not make it, and she said, 'Nellie, you are harassing me to death.' Mrs. Johnson said she would go if the will were not made; Mrs. Beyer said, 'You have run Mrs. Stone out of the house to get something when I die. You said she was waiting for a dead man's shoes, but you are the one to catch it.'" (R., 44 *f*, 82.)

Now, upon the existence in the record of these incoherent ejaculations, the court is asked to say that Mrs. Beyer would not have made this will which preserved a home for her husband and adopted children, but would have left them to be turned into the street by her collateral relations. The appellee would have us believe that the wife and mother could have been guilty of this unnatural act, although the record discloses not a single reason why she should have left her property to collaterals instead of those who were nearest and dearest to her.

The witness does not remember when these alleged conversations were had, except that she *thinks*, but does not know, that it was the winter before Mrs. Beyer died. She died July 26; so that, putting it at that indefinite time, it would be anywhere from six to nine months before her death.

"Q. When was the first time you heard any conversations? A. It was during the winter. *I do not know* what time it was, but I know it was in the winter.

"Q. The winter before she died? A. *I do not know whether it was the winter before she died.* I do not *know* what time it was; but I know it was in the winter.

"Q. The winter before she died? A. *I do not know whether it was the winter before she died.* I heard them talk about it. I do not know what day it was, *or the year.*

"Q. But it was in the winter? A. Yes, sir.

"Q. The winter before Mrs. Beyer died? A. Yes, sir, I *think* it was in the winter before she died, yes, sir, I *think* it was. (R., 48.)

This was the only attempt to fix any time for these conversations. They are explicitly denied by Mrs. Johnson; but

even if they were not, it certainly cannot be said that their effect is to establish that Mary Beyer's will, made at least eight or nine months, if not years, afterwards, was "procured by fraud, circumvention, or undue influence practiced or exercised upon the said Mary Beyer by Louis Beyer, Jr., Helen B. Johnson, or by either of them, or by any other person."

If then this evidence is insufficient under the well-settled rule which requires "clear, explicit and strong" evidence to establish a fraud, what other evidence is there? On the other hand, the testimony of the family physician, of the family pastor, of the lawyer who drew the will, of Dr. Atkinson who witnessed it, of the adopted children, and, more than all, of the provisions of the will itself, make it overwhelmingly clear that the will was the result of Mrs. Beyer's own proper wishes communicated to her attorney on three separate occasions with no one present to influence her, and after she had made and caused to be destroyed at least one will, because, in regard to its failure to provide directly for Mrs. Johnson instead of in trust, she had changed her mind. We submit that if ever the entire absence of undue influence, at the time of the making of a will, was established, it had been established in this case.

But even if we had offered no evidence whatever to sustain the proposition that the will was the free act of Mrs. Beyer, it does not follow that, standing alone, as it does, the incoherent jumble of isolated facts testified to by this unlettered servant girl is sufficient to overthrow the legal presumption of the validity of a will made by a person of conceded mental capacity to make it:

"In order to set aside the will of a person of sound mind, it is not sufficient to show that the circumstances attending its execution are consistent with the hypothesis of its having been obtained by undue influence; it must be shown that they are inconsistent with a contrary hypothesis, and the same holds true where positive fraud or force is the ground of objection. Hence, it is that isolated and disconnected circumstances are not permitted to outweigh the usual presump-

tion of the law that a person of intelligence and capacity who executes a will does so without imposition or undue influence."

Schouler on Wills, Sec. 239, citing Boyse *vs.* Rossborough, 6 H. L. Cas., 6;
Most *vs.* McGlynn, 88 N. Y., 357;
Fritts *vs.* Deuemberger, 12 N. J. Eq., 129.

Again, not even Fanny Perry undertakes to say that Louis Beyer, Jr., or his adopted father, ever said or did a single thing which can be characterized as undue influence; and yet to set aside this will would be to deprive them of the legitimate benefaction of the mother and wife, and especially to throw the aged husband upon the charity of the world. Would Mary Beyer, could she speak from her grave, declare that she was unduly influenced to make this provision for them? It is unnatural to suppose that she would say so.

The provisions of the will are just and natural.

It is just such a will as many persons under the circumstances would have made, viz: leaving the property to the children with directions amounting to a trust to permit the husband and father to use it as his home during his lifetime. Other wives, it would be said, might have left the property directly to the husband. But it is certain that not one person in fifty, under the circumstances of this case, would have left any portion of it to the appellee, who was married and had contributed nothing to the testatrix's life; whereas the defendants, the beneficiaries of her bounty, are her husband and adopted children.

"If the provisions of a will are just, natural, and reasonable, these facts will do much to show that it was the proper will of the testator."

27 Ency. Law, 502.

"The harmony of the will with the testator's habitual disposition and affection is worthy of much consideration."

Allen *vs.* Public Adm'r, 1 Bradf. (N. Y.), 378.

(4) The Findings of the Jury Are the Result of the Law Judge's Instructions Upon a Supposititous State of Facts, and of Duress to Bring About a Finding Thereon.

The record supports us in this statement. Some of the jurors, as we learn from the statement to the court by the foreman (R., 111–112), seem to have been under the impression, without a particle of evidence to sustain it, that Louis Beyer, Jr., had exercised undue influence over Mary Beyer. There was almost at the very outset a disagreement in the jury room in regard to this. Thus the record discloses the following:

"The jury retired, and, after an hour spent in deliberation, returned to the court room for further instructions.

"The CLERK: Gentlemen of the jury, have you agreed upon a verdict?

"The FOREMAN: No, your Honor, a controversy has arisen among the jurymen as to the effect of the instructions of the court relative to undue influence. We ask that you give us further instructions upon that point. In order that you may understand the difficulty that we labor under, I will say that some of the jurymen have the impression that the *importunities of Louis Beyer, Jr.*, [there was not a scintilla of evidence of any such importunities], and Mrs. Helen Johnson, if made either affectionately or by persistence are undue influence, and on that point we are at outs, and we desire to have further information from you upon that point.

"The COURT: If the will was brought about by the influence of affection of Mrs. Beyer for her nephew and niece—if she made the will in their favor because of her affection for them, although they may have persistently cultivated her affection that would not be undue influence." (R., 112, *f.* 215.)

There was no testimony as to whether they persistently cultivated the affection of their aunt or not. The record contains nothing whatever bearing upon the subject, other than the fact that Mrs. Beyer had adopted them as her children; the statement of the court, therefore, was not called for; there is nothing, however, for us to complain of in that. But the court goes on and, to our serious undoing, instructs the jury

upon a purely *imaginary* state of affairs as if there were some evidence in the case to support it; thus:

"But if the will was brought about by their [which includes Louis Beyer, Jr.] *persistent importunities* upon her to make a will in their favor; if they were so continuous and earnest and annoying that she, *in her condition*, [What condition? Is there any testimony that she was feeble in mind? The very contrary is the case, and the jury so found.] yielded to them and made a will as they desired, *in order to get rid of their importunities*, a will different from what she wanted to make, then it was undue influence. (R., 112.)

We earnestly submit that the testimony in this case cannot by the wildest imagining be twisted or tortured into the semblance of any such state of facts. Certainly the testimony of Fanny Perry as to Mrs. Johnson, the niece, does not support it, and nobody breathes a word about the husband or the nephew having said or done anything that can be claimed to even tend to show "persistent importunity" or "annoying importunity," and yet the jury are sent out of the court by the judge to brood over such an imaginary case.

(5) The Duress and Coercion of the Jury to Render a Verdict.

But that is not all. After deliberating several hours over this supposititious state of affairs, the jury come again into the court room, whereupon the record (112) discloses the following colloquy:

"The CLERK: Gentlemen of the jury, have you agreed upon a verdict?

"The FOREMAN: No, your Honor; after *a very deliberate consideration* of the subject referred to us by these interrogatories, I find the jury divided—hopelessly so.

"The COURT: Not so now. Some twelve men are to decide this case. I do not believe we could get twelve better men in the District of Columbia to decide it than you are.

"The FOREMAN: If you will permit me to say, that is the difficulty; we have apparently twelve intelligent and self-willed men.

"The COURT: Yes; do not yield your conscientious convictions; but there is a right and a wrong—I mean the evidence proves one or the other. See what the fact is and decide it."

It was Friday afternoon; and, as the court was about to adjourn, the jury are told to render a sealed verdict. Then the court proceeds to say:

"Then put it in an envelope, let the foreman take it and keep it until Monday morning at 10 o'clock and then bring it into court. You will remain in your room *and not separate until you have decided the case*, written the answers to the interrogatories and signed your name on the paper. *So soon as you shall have done that*, then you will be *at liberty* to separate and go to your homes.

"The FOREMAN: Your Honor, I am sure you will keep us here until Monday morning.

"The COURT: I am quite satisfied you will be out of there by bed time. * * * We will not trouble you to come back here Saturday morning.

"The FOREMAN: We are not to leave the room until after we have reached a conclusion?

"The COURT: *You are not to separate* except that one of you may want to go out [*i. e.*, to answer the calls of nature]. If any of you want a lunch, let the messenger know, and he will send out and get it."

The incident then closes with these words:

"The jury retired; and, the court having adjourned, a sealed verdict was handed in Monday morning."

Here, then, was a jury which after hours of "deliberate consideration" comes into the court and tells the judge that they are "hopelessly divided." The judge, notwithstanding, sends them back to their room, telling them to "see what the fact is and decide it," adding these important and, to the jury, *ominous* words: "You will remain in your room *and not separate until* you have *decided* the case." Nor did the court neglect to hold out the pleasant inducement that "so soon as you shall have done that (*i. e.*, decided the case) you will be at *liberty*." With the fear that they will be kept there "until

Monday morning" the jury go back to their room. The record does not show whether they agreed "by bed time" or not; but they secured their "liberty" by agreeing, and the sealed verdict was brought in on Monday morning. We submit with confidence that it is impossible to say that this verdict was not the result of coersively surrendered convictions. It was a verdict rendered, as we have seen, by a "hopelessly divided" jury, under pressure of having to remain in the jury room over Sunday, "and not to separate until you shall have decided the case." Such a verdict demands a close and critical examination of the evidence by the Chancellor before he is entitled to say he "cannot certainly entertain a doubt" (R., 141) that the verdict is what it should have been.

(6) The Jury Trial a Nullity.

An examination of the evidence by this court is, we believe, all that will be required in order to secure the rejection of the jury's findings; but, if it be necessary to go further, then we insist that the trial was a nullity because of these instructions by the trial judge to the jury after they had informed him, through the foreman, that they were "hopelessly divided." The authorities fully sustain us in this contention. In Pierce *vs.* Pierce, 38 Mich., 412, the court said:

"Every attempt to drive men [a jury] into an agreement which they would not have reached freely is a perversion of justice."

In Green *vs.* Telfair, 11 How. Prac. (N. Y.), 260, the court, after expressing its views as to the length a judge may go in the endeavor to get the jury to agree, added:

"Any attempt to influence the jury by referring to the time they are to be kept together, or the inconveniences to which they are to be subjected in case they are so pertinacious as to adhere to their individual opinions, and thus continue to disagree, cannot be justified. A judge has no right to threaten or intimidate a jury in order to affect their deliberations. *I think he has no right even to allude to his own purposes as to the length of time they are to be kept together.* There should be

nothing, in intercourse with the jury, having the least appearance of duress or coercion."

There was a reversal on this ground.

In Slater *vs.* Mead, 53 How. Prac. (N. Y.), 57, the jury, after being out a long time, reported that they could not agree. After further instructions, the court said *inter alia:*

"You must agree upon a verdict. I cannot discharge you until you agree upon a verdict."

The jury retired and soon after agreed. The appellate court set the verdict aside as induced by constraint.

In 16 American and English Encyclopedia of Law, 522, the rule is said to be that:

"Language on the part of the court, the obvious tendency of which is to coerce an agreement on the part of the jury, affords ground for a new trial. *To insist too strenuously upon the necessity of an agreement may have such effect.*"

In Randolph *vs.* Lampkin, 90 Ky., 551, some of the language of the trial judge was:

"Gentlemen, how do you expect this case to be decided unless you do it? You must decide it."

The Supreme Court of Kentucky said:

"It does not appear, nor is it contended, that the judge of the court intentionally abused the discretion he had, and might necessarily exercise, as to the length of time the jury ought to have been kept together with a view to agreement upon a verdict. But it seems to us, when the fact that the jury had come into court, *and announced it impossible for them to agree*, and the length, tone, and manner of the address by the court are considered, the conclusion is almost inevitable that the jury brought in a verdict which they would not have rendered but for the interposition of the court. And as the actual finding *shows some evidence of a compromise of opinion*, and yielding by some of the jury of their previously announced *unalterable* conviction, we think the verdict cannot be regarded as the result of deliberate judgement."

It is true that the trial judge in the case at bar, in answer to the foreman's statement that there were "twelve intelligent, self-willed men" on the jury, said "Yes; do not yield your honest convictions." But this was a single, brief sentence preceded and followed by so many that were highly objectionable that its effect, as the result proved, was completely lost amid all this obnoxious language. In State *vs.* Bybee, 17 Kans., 462, the trial judge used even a stronger disclaimer of attempting to coerce the jury, saying: "It is not my purpose to force you to a verdict not in accordance to your convictions," but at the same time he dwelt with considerable length and in very forcible language upon the importance of coming to an agreement. On a writ of error to the Supreme Court of Kansas a new trial was granted on this account, notwithstanding the disclaimer. Mr. Justice Brewer, delivering the opinion of the court, said:

"It may not perhaps be possible to single out any particular sentence, and say that this is, strictly speaking and taken by itself, erroneous, and sufficient to justify a reversal, though there are some that seem to tresspass a good deal on the right and duty of each juror to the free exercise of his individual judgment. Yet the general impression of these instructions, as we read them, and as it seems to us, must have been received by the jury, is that the jury ought, by *compromise, and surrender of individual convictions if necessary*, to come to an agreement and that a failure to so would be an imputation upon both jury and court."

Another expression of the trial judge on the occasion referred to in the case at bar, was:

"You are not to seperate. * * * If any of you want a lunch, let the messenger know and he will send out and get it." (R., 113.)

There is no law, or rule of court or appropriation made in the District of Columbia which provides for the furnishing of meals to jurors in civil cases when they are confined in the jury room considering of their verdict. No matter how long they are confined, if a juror needs food he must obtain it at

his own expense. The action of the judge, therefore, in stating to a jury late Friday afternoon, just as the Court was about to adjourn, and after they had just declared to him that they had deliberately considered the case and were hopelessly divided, "You will remain in your room and not separate until you have decided the case," and then adding this remark as to getting food was equivalent to saying, "If you need food you must get it at your own expense." Apropos to a similar situation is the case of Physioc *vs.* Shea, 75 Ga., 466, where the jury, having been out all night, came into court and stated that they could not agree. The judge refused to discharge them and sent them back to their room, telling them (as did the judge in this case,) that they should be made as comfortable as possible, "*but they must get their meals at their own expense.*" It was held by the Supreme Court of the State that this language operated as a threat *to starve such as had no money* into finding a verdict.

Again, the statement made to the jury that "there is a right and a wrong—I mean the evidence proves one or the other. See what the fact is and decide it," did not submit the case properly to the jury. It ignored and eliminated entirely from the case the consideration (a,) of the amount of proof necessary to establish undue influence, and (b,) that the defendants were not bound to prove anything. The issue was: "Are the defendants, or any of them, guilty of exercising fraud, circumvention or undue influence upon Mary Beyer to procure this will?" To this the Court said, referring to the evidence: "There is a right and a wrong [*i. e.*, guilt or innocence,] the evidence proves *one or the other.*" Yet it was not necessary that the evidence should *prove* innocence, and the jury might not have thought that it did. Now if the jury had thought, as they might have done, that the *negative* of the issue had not been satisfactorily proved by the defendants it did not follow because there may have been *some* testimony offered by the plaintiff tending to prove the affirmative, therefore, the charge of fraud, circumvention or undue influence was sufficiently proved. Yet the court so gave the jury to understand—"the evidence proves [establishes] one or the other."

The instruction, in other words, placed upon the defendant the burden of proving innocence—of proving a negative. In Cranston *vs.* N. Y. & H. R. R. R., 103 N. Y., 614, which was a suit to recover damages for injuries received, a verdict for the plaintiff was set aside because of the use by the trial judge of similar language to a jury which had difficulty in agreeing.

Rapallo J., after stating that on the uncontroverted evidence it was a serious question whether the plaintiff was entitled to recover, said:

"But we need not discuss that question, as the case contains an exception which we are *all* agreed is well taken, and requires a reversal of the judgment and a new trial. After the jury had retired to consider their verdict, they came into court, and one of them stated that there was *no probability of their agreeing.* To this the court replied as follows: 'I can't take any such statement as that, gentlemen; you must get together upon a matter of this kind.' He then added, 'no juror ought to remain entirely firm in his own conviction one way or another until he has made up his mind, beyond all question, *that he is necessarily right and the others are necessarily wrong.*' To this statement the defendant's counsel excepted. The jury thereupon brought in a verdict for the plaintiff. We are of the opinion that the instruction excepted to was not a correct statement of the law. It was incumbent upon the party holding the affirmative of the issue, who in this case was the plaintiff, to satisfy the jury, by a preponderance of evidence, of the facts upon which her right to recover depended. If she failed to do so the defendant was entitled to a verdict. The jurors who were not satisfied by the evidence, of the truth of the plaintiff's allegations, were justified in refusing, for that reason, to find a verdict in her favor, although they might not have made up their minds beyond all question *that they were necessarily right*, and that those who were in favor of finding a verdict for the plaintiff *were necessarily wrong.* To sustain this instruction would be to cast upon the defendant, in a civil action, a burden quite as heavy as that which rests upon the prosecution in a criminal case, and perhaps still more onerous."

Of course, in all that we have said as to the force and effect of the remarks of the trial judge, we have not intended the

slightest reflection upon his purpose to be entirely fair in his conduct of the case. We accept and adopt, and wish to apply to him in all its fullness, what was said by Mr. Justice Brewer in the Kansas case heretofore cited—State *vs.* Bybee, *supra:*

"All of the present members of the court have had experience as district judges, and know what is their solicitude for the agreement of juries, and their repugnance to see the labors of a trial prove abortive through the failure of the jury to agree. We therefore fully appreciate the considerations which induced these instructions from the learned judge, and fully sympathize with the spirit which controlled him, but are nevertheless constrained to believe that he passed beyond the line which should limit the counsels and instructions of a court to a jury, and that thereby the material rights of the defendant were prejudiced."

The finding of the jury was not, therefore, the true judgment (*veredictum*) of twelve *satisfied* jurors. We use this word because both the Chancellor below and the Court of Appeals have used it more than once. "The jury were satisfied," they say. On the contrary, we submit that the entire colloquy between the court and the jury shows that their subsequent verdict was the result of the surrendered convictions of some of these intelligent but "self-willed men," coerced into doing so under fear of imprisonment, if we may so express it, from Friday afternoon until Monday morning, with the inducement before them, as suggested by the trial judge, that they could obtain their *immediate liberty* by "deciding the case." Under these circumstances, the "hopelessly divided" jury came to an agreement, and obtained immediately their promised liberty. It was not, therefore, the united and unanimous conviction of "twelve men, good and true," and consequently these findings stand upon the record as a nullity.

Respectfully submitted,

FRANKLIN H. MACKEY,
HENRY E. DAVIS,
For the Appellant.

No. 237.

Brf. of Poe for Appellee

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Supreme Court of the United States.

OCTOBER TERM, 1901.

No. 237.

LOUIS BEYER, APPELLANT,

vs.

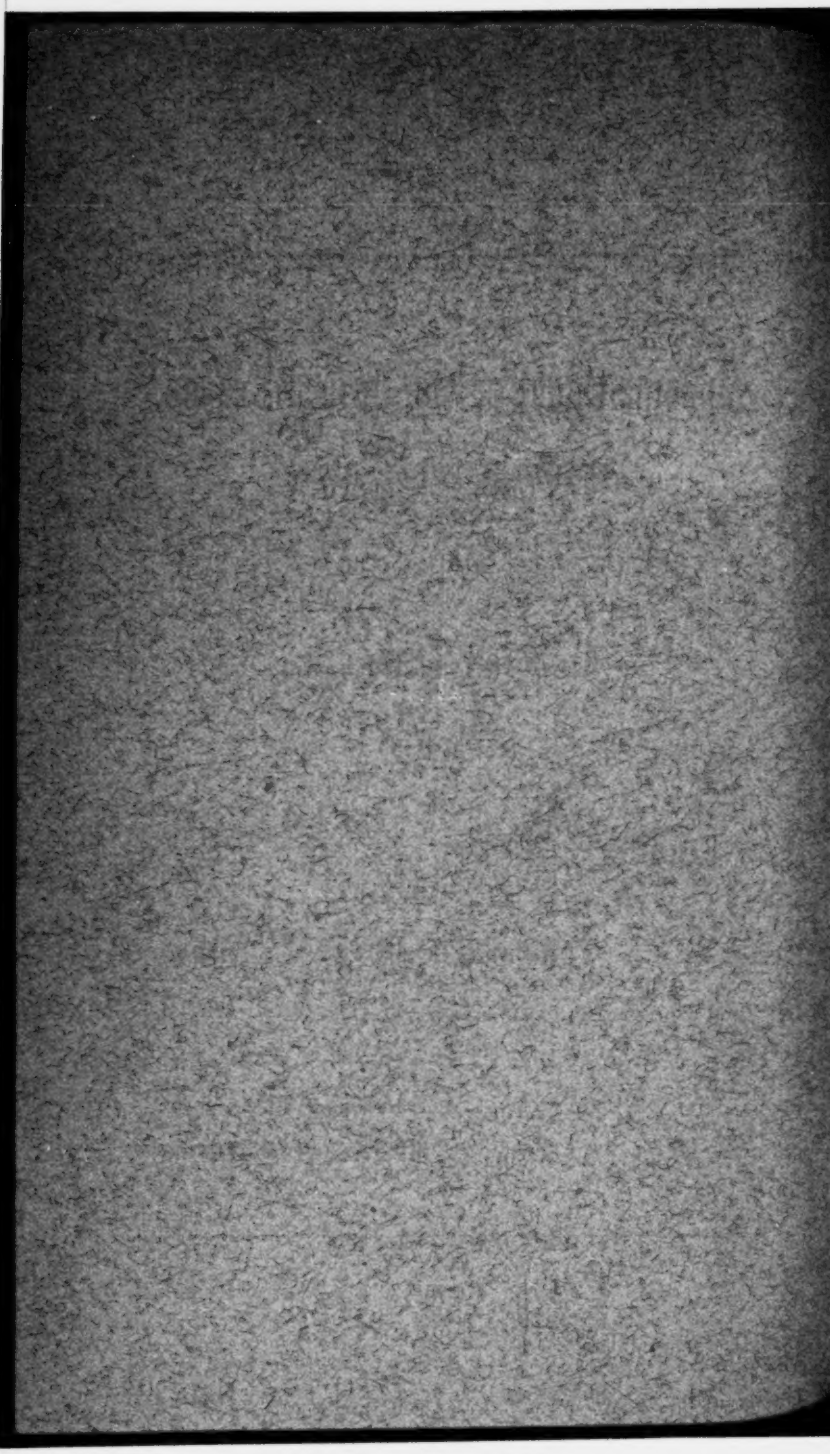
CAROLINE LE FEVRE.

APPELLEE'S BRIEF.

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IN THE

Supreme Court of the United States.

OCTOBER TERM, 1901.

No. 237.

LOUIS BEYER, APPELLANT,

vs.

CAROLINE LE FEVRE.

APPELLEE'S BRIEF.

This is an appeal from a decree of the Court of Appeals of the District of Columbia by Louis Beyer, the elder, which decree was passed on the 6th day of December, 1900, and affirmed a decree of the Supreme Court of the District of Columbia passed on the 16th day of May, 1900. (Record, page 142.)

All other persons who were appellants in the Court of Appeals of the District of Columbia, refused to join with the appellant in his appeal to this Court, and an order of severance was passed, and he was allowed to prosecute his appeal separately in his own behalf. (Record, page 143.)

The facts of the case are very clearly set out in the opinion of the Court of Appeals, delivered by Mr. Chief Justice Alvey, which is to be found on pages 133 to 142 of the Record, but it is considered not improper to give here also, a resume of them.

The appellee is a sister of Mary Beyer who died on the 26th of July, 1896, having on the 14th of that month made what purported to be her will, which is to be found on page 8 of the Record. The appellant was her husband, but they had had no children. The deceased was about sixty-five years of age at the time of her death, and left surviving her, besides her husband (the present appellant) two sisters, the appellee, and one Elizabeth K. Maus, and the descendants of another sister, who had died during her lifetime. It is conceded that she owned the equity in valuable real estate in the District of Columbia, which was subject to a deed of trust, but left hardly any personal property. The paper writing purporting to be her last will, and testament, after mentioning her husband, and, what it is now contended by the appellant were her wishes as to him, and leaving five dollars each to her sisters and one of her nieces, devised the residue of her estate to her nephew, Louis Beyer, Jr., whose right name was Charles Louis Smith, the child of a deceased sister, and her niece Helen B. Johnson, the child of a living sister, Elizabeth K. Maus, as tenants in common, and appointed Louis Beyer, Jr. her executor without bond. It is also conceded that this paper was offered for probate on the 20th day of August, 1896, and that letters testamentary thereupon were granted to Louis Beyer, Jr. on Sept. 25th, 1896. It will be observed that at that time the Orphan's Court in the District of Columbia had no jurisdiction as to wills devising real estate, that jurisdiction not having been conferred upon that Court until June, 1898.

Campell *vs.* Porter, 162 U. S., 418.

It is also conceded that since the death of Mary Beyer Elizabeth K. Maus, who was a sister of Mary Beyer, the alleged testatrix, conveyed to the defendant, Helen B.

Johnson, who was her daughter, whatever interest she might have had in the estate of Mary Beyer, and it is also admitted that Elizabeth K. Maus, has since died.

On April 7th, 1899, the appellee exhibited her bill of complaint against the present appellant and others in interest setting up the above facts, among others, alleging that the title of the said Mary Beyer to her real estate situated in the District of Columbia, was but an equitable one, and further alleging that the said Mary Beyer was not competent to make a will, and that the paper bearing date the 14th day of July, 1896, purporting to be a will had been obtained by fraud and undue influence, and praying that it might be so decreed; asking also for an account of the rents, issues and profits of the estate, and that a mortgage deed of trust put upon the property after the death of the said Mary Beyer by the present appellant might be decreed to be invalid as being a cloud upon the appellee's title, and also praying for general relief. The bill was accompanied by several exhibits showing the nature of the estate held by the deceased, her will, and the deed of trust so alleged to form a cloud on the title of the present appellee. (Record, pages 1 to 12.)

Answers were filed by some of the defendants denying the facts and also denying the jurisdiction of the Court to the same extent as if that point were raised by demurrer, (Record, page 13–18) and the defendant Louis Beyer, the elder, the surviving husband and the appellant in this Court, simply demurred. (Record, 19.) The cause came on to be heard on this state of the pleadings on the demurrers, and after argument, the Court took the papers, and while the matters were being considered by the Court, the following stipulation was entered into and signed by the solicitors for all the parties:

> "It is hereby stipulated by and between the parties to this cause this 20th day of June, 1899, that the Court may make an order certifying issues to be named in said order to be tried by a jury of the Circuit Court, and the finding by said jury upon said issues shall be returned to this Court, whereupon a decree shall be entered in accordance with said findings, all rights of appeal, as in cases of issues from the Orphan's Court, being hereby reserved." (Record, 126.)

All the parties are of full age and under no disability. (Opinion of Court, Record, 116.)

Issues were the same day framed, the parties all consenting to them, and assenting to the passage of the order framing them. (Record, 127.)

The case was then fully tried before a jury according to the rules of common law, and in accordance with the intent of the stipulation of the parties, and the jury by its verdict, decided the paper was procured by fraud and undue influence, and upon a motion for a new trial, the trial judge refused to disturb the verdict, and certified the findings of the jury to the Equity Court for its final action, (Record, p. 130). When the cause came back to the Equity Court for hearing the testimony before the jury which had been taken down stenographically was all read again to the judge who was presiding in that Court, and he also expressed himself as satisfied with the verdict and decreed in accordance therewith. It will thus be seen that the facts of this case have been passed upon by a jury, by the trial judge, refusing to disturb the verdict of the jury, by the Chancellor whose conscience was to be informed and who also was satisfied with that finding, and again by the Court of Appeals. (See Opinion of Mr. Chief Justice Alvey, Record, page 141.)

Points.

I. The estate of which Mrs. Mary Beyer died seized was of a mere equitable character, and under the circumstances ejectment could not have been brought for its recovery.

Lincoln *vs.* French, 105 U. S., 614.
Brobst *vs.* Brock, 10 Wall., 519.
Morsell *vs.* National Bank, 91 U. S., 357.
Van Ness *vs.* Hyatt, 13 Pet., 298.
Bank of Metropolis *vs.* Guttschlick, 14 Pet., 19.

II. At the time of the death of the decedent, the Orphans' Court in the District of Columbia, had no jurisdiction over her real estate, and there was no power in that Court to pass upon the validity or invalidity of her will. The appellee in this case, who claims as *heir-at-law against* and *not under* the paper writing which purported to be the will of the decedent could therefore not appeal to that jurisdiction for protection. There was but one thing therefore, for her to do, and that is precisely what she did do. That is to exhibit her bill in a Court of Equity. The precedents for such a course are ample to justify that adopted by her, and the case chiefly relied upon to established this claim is that of Boyse *vs.* Rossborough, 6 House of Lords Cases, p. 2., in which the facts are strikingly similar to those in the case at bar, and in which all the authorities are reviewed by Lord Cranworth, and his conclusions adopted by that august body. This Court having determined as we have seen, in the case of Campbell *vs.* Porter, 162 U. S., 478, that the Orphans' Court had no jurisdiction over wills devising real estate, and having also decided in the case of Broderick's Will, 21 Wall., 503, that a court of equity has jurisdiction (where no other Court can afford complete relief) to vacate and annul a will, in the present case it became necessary

to review the authorities, as has been so well done in the opinion filed by Mr. Chief Justice Alvey, which will be found on pages 133 to 142 of the record. In this opinion the doctrine adopted by the House of Lords in the case of Boyse *vs.* Rossborough, 6 House of Lords, Cases 2, has been adopted. That was a case in which an heir-at-law sought to set aside the will of his ancestor, on the ground of lack of testamentary capacity and undue influence, by filing a bill of chancery in which he alleged that the estate of his ancestor was subject to mortgages (just as the estate of the decedent, Mary Beyer, in this case is) and that this fact prevented him from instituting an action at law. The house of Lords held that the Court of Chancery had jurisdiction in its descretion to pursue either one of two courses; to wit, either to direct issues to be framed and tried by a jury, or to grant an injunction to prevent the devisees under the will from pleading the fact that the plaintiff's title was but an equitable one. In this case, as in that in the House of Lords, the Court directed issues to be framed. It was simply a matter of discretion and not of jurisdiction,

III. The parties to the cause consented to the mode of procedure by their solemn agreement filed in the cause, and sanctioned and confirmed by the Court, had their trial by jury, by the same tribunal, and in the same mode and manner that they would have had in an action of ejectment, and it is at least pardonable in us to characterize their present attitude as one not entirely fair to the Court or opposing counsel. They lost their cause after a fair trial in a tribunal of their own selection.

SUPPOSE THEY HAD WON IT!!!

IV. It is too late to object to the manner chosen to have a jury trial.

Strong *vs.* Willey, 104 U. S., 512–515.

V. This Court will not disturb the decree upon the facts unless the conclusions reached by the lower Courts upon them be glaringly erroneous. As has been seen, the jury found them, the trial judge refused to disturb the verdict of the jury, the chancellor was satisfied with the verdict, and so was the Court of Appeals. It is a rule of this Court that when two lower Courts have agreed in their findings of facts, they are conclusive upon it, unless something practically equivalent to fraud appears upon the face of the Record.

Workman *vs.* Mayor of New York, 179 U. S., 555.
The Carib Prince, 170 U. S., 655–658.
Stewart *vs.* Hayden, 169 U. S., 114.
Compania de Navigation, etc. *vs.* Brauer, 168 U. S., 104.

THE FACTS.

VI. Even if this were not the rule of this Court, the jury and all the Courts which have passed upon the facts in this case, were undoubtedly right in their verdict and decrees. The pretended testatrix was dying of a cancer which was maglignant, progressive and incurable. She was being fed on champagne, and drugged with morphine to alleviate her pain—not to cure her. She made three wills within forty-eight hours, and died within twelve days. During most of this time she was in a comatose condition. She could only be induced to make a will after she was told that, having had no children, in case of intestacy, her husband would get nothing. Her primary object in making a will was that he might take, and by each of the three papers which she is said to have executed, she disinherited him. He was not aware of the fact of the execution of these wills, nor present when they were signed. He did not know of them until after her death, and became so indignant when he heard she had

left a will, that the residuary legatees in their fright gave him a deed to half of the property to appease his righteous indignation, He, who knew her best of all people on earth, did not take the witness stand to say that she was competent to make a will. They had lived together forty-five years, were living together when these papers were signed, and he was not only not consulted, but the facts were concealed from him. He and she had earned together by their joint toil the money that bought the property, and it is said that she of her own volition devised it away from him.

WAS IT A NATURAL WILL?

The man who drew the will had never seen her until he went to her room and announced himself as the man who had been sent by her nephew to draw her will. These few facts are sworn to by the witnesses for the defendants. There are many more to which the attention of the Court will be called at the hearing. We think that the decree is proper and just and respectfully submit that it should be affirmed.

CHARLES POE,
Of Counsel for Appellee.

No. 237.
Brief of Emig for Appellee
Office Supreme Court U. S.
FILED
APR 15 1902
JAMES H. McKENNEY,
Clerk.
Supreme Court of the United States.
Filed April 15, 1902.

OCTOBER TERM 1901. NO. 237.

LOUIS BEYER, Appellant,

vs.

CAROLINE LE FEVRE.

APPEAL FROM THE COURT OF APPEALS OF THE DISTRICT OF COLUMBIA.

BRIEF FOR THE APPELLEE.

CLAYTON E. EMIG,
Attorney and Solicitor
for the Appellee.

Saxton Printing Co.
Washington, D. C.

27081

IN THE

Supreme Court of the United States.

OCTOBER TERM 1901.

No. 237.

LOUIS BEYER,
Appellant,

vs.

CAROLINE LEFEVRE.

BRIEF FOR THE APPELLEE.

STATEMENT OF FACTS.

In opposing this appeal, nothing will aid the Court so much in considering the same, as an adequate history of the controversy from the outset. It has already been stated in the opinion of Mr. Chief Justice Alvey, on page 133 of the record, that the appellant was the husband of Mary Beyer,

who died on the 26th day of July, 1896, at the age of about 65 years. The deceased left no children surviving her, but a husband, two sisters, and two descendants of a pre-deceased sister. Little or no personal property has been disclosed by those who had charge of her estate.

She owned, at her death, the right of an equity of redemption in valuable real estate lying in the District of Columbia, the legal estate being vested in certain trustees, by virtue of a certain deed of trust, to secure the sum of twenty-eight hundred ($2,800) dollars, money loaned to said Mary Beyer.

On the 29th day of August, 1896, there was filed in the office of the Register of Wills, for the District of Columbia, a certain paper-writing, purporting to be the last will and testament of Mary Beyer, which was probated as a will of personalty.

By the terms of said paper-writing, the said Mary Beyer gave five dollars to each of her two sisters, and one niece, a descendant of a pre-deceased sister, and pretended to devise the residue of her valuable estate to her nephew, Louis Beyer, Jr. (whose right name was Charles Louis Smith), another descendent of said pre-deceased sister; and to her niece, Helen B. Johnson, as tenants in common; and appointed said Louis Beyer, Jr., her executor, without bond. (Record p. 8.)

The appellee filed her bill in equity in the Supreme Court of the District of Columbia on the 7th day of April, 1899, the substance of which is vividly set forth in the opinion of Mr. Chief Justice Alvey on pages 133–135 of the record.

On the 12th day of April, 1899, the equity court passed an order, that the prayer for the writ of injunction and order appointing a receiver contained in the bill be set down for hearing on Tuesday, the 18th day of April, 1899, at 10 o'clock a. m., provided a copy of said order be served on the defendants, or their solicitors on or before April 14th, 1899.

(Record, p. 12.) This order having been complied with, all the defendants named in the bill appeared in court on the day and at the hour named.

The defendants, Louis Beyer, Jr., in his own right and as executor, and also Helen B. Johnson, each filed a separate answer to the bill of complaint, and at the conclusion of each answer they each submit the same as a response to the rule to show cause. Each answer admits many of the averments of the bill, but denies the charge of fraud, and that said Mary Beyer was incapable of executing a valid deed or contract. Each answer also raises the question as to the jurisdiction of the court as if they had demurred to the bill. On the same day the defendants, Cohen and Wolf, trustees, appeared and filed their joint answer to the bill, avering on information and belief that the deed of trust to them by Louis Beyer, Sr., is a valid lien on said real estate. They also make objection to the jurisdiction of the court as if raised by demurrer, and submit their answer to the bill as a response to the rule to show cause. The defendants all appeared by counsel at the hearing of the bill, answers, and demurrers. Upon consideration of the pleadings, the court ordered that the rule to show cause, passed on the 12th day of April, 1899, be discharged, and the complainants motions for a receiver and injunction be denied. (Record, p. 19.)

The court, however, retained the bill, answers and demurrers therein contained, of the defendants. While the court was so considering the same, no steps were taken by either party to the cause, until the 20th day of June, 1899, when the following stipulation for trial by jury was formulated and agreed upon between all the parties to the cause, which stipulation was signed by every solicitor representing a party to the cause. It reads as follows:

IN THE SUPREME COURT OF THE DISTRICT OF COLUMBIA.

LEFEVRE
vs.
BEYER ET AL
} Equity No. 20,324.

It is hereby stipulated by and between the parties to this cause this 20th day of June, 1899, that the court may make an order certifying certain issues, to be named in said order, to be tried by a jury of the circuit court, and that the findings by said jury upon said issues shall be returned to this court; whereupon a decree shall be entered in accordance with said findings, all rights of appeal, as in cases of issues from the orphans's court, being hereby reserved. (Record, p. 126.)

On the same day, to wit, June 20th, 1899, the following order framing issues to be tried by a jury, and certifying the same to the circuit court was prepared and assented to by each solicitor representing a party to said cause, as is evidenced by their respective signatures. The order was then presented to the court (Cole, *J.*), for signature who, up to that time, held all the papers in said cause under advisement. It reads as follows.

Ordered by the court this 20th day of June, 1899 (the parties to this cause consenting hereto), that the following issues to be tried by a jury be, and they hereby are, certifiied to the circuit court, to wit;

First. Was the said Mary Beyer, at the time of the alleged execution of the paper-writing bearing date the 14th day of July, A. D. 1896, and purporting to be her last will

and testament, of sound and disposing mind, memory and understanding, and capable of executing a valid deed or contract?

Second. Was the execution of said paper-writing, bearing date the 14th day of July, 1896, and purporting to be the last will and testament of the said Mary Beyer, procured by fraud, circumvention, or undue influence practised or exercised upon the said Mary Beyer by Louis Beyer, Jr., Helen B. Johnson, or by either of them, or by any other person?

Third. Were the contents of the paper-writing, bearing date July 14th, 1896, and purporting to be the last will and testament of said Mary Beyer, known to her at the time of the alleged execution thereof?

We assent to the passage of the above order. (Record, pp. 126 and 127.)

The above named issues were, on the 20th day of June, 1899, certified to the circuit court for trial in accordance with the stipulation. (Record, p. 20.)

No further action was taken by either party to the cause until the trial of said issues on the 6th day of December, 1899, nor did the court hand down any decision upon the questions submitted for its consideration on the 18th day of April, 1899.

At the trial of said issues, to wit, December 6th, 1899, all the parties to said cause appeared in open court, and submitted to the trial of the issues certified to said circuit court for said trial by jury. The proceedings were prolonged for some days, and each defendant, represented by counsel, took part and hotly contested each step.

The jury, after careful deliberation, found "that while the deceased was of sound and disposing mind and knew the contents of the paper, yet the execution of the same

was procured by fraud, circumvention or undue influence." The defendant, Louis Beyer, Sr., alone filed a motion for a new trial, based upon seven different grounds, none of which, however, raise the question of the jurisdiction of the court. (Record, pp. 129 and 130.)

On the 6th day of January, 1900, the court (Cole, *J.*), who had presided at the trial of the issues, and had lately been transferred from the equity court to the law court, after a full hearing, on the grounds alleged in said motion, overruled the same, and certified the findings of said jury back to the equity court, from whence they had come. (Record, p. 130; also, p. 20.)

On March the 8th, 1900, after said issues had been returned to said equity court, all the parties, by their solicitors, again stipulated (the issues of fact having been found against the will, both by the jury and the trial court), that the testimony and proceedings had on the above stated issues before Mr. Justice Cole and a jury may, together with the motions for a new trial and the order of the court made in the matter, and all orders and proceedings passed or had therein, be produced and considered by the court as part of the record on hearing in the equity court of this cause, and in any appellate court to which said cause may be carried by either party. (Record, pp. 27 and 28.) This stipulation was agreed to and signed by every solicitor for the respective parties. At the hearing before the Chancellor, all the testimony was read, as well as all the proceedings had before said jury; the conscience and good judgment of the Chancellor (Barnard), was satisfied with the evidence and verdict, and all the proceedings. He rendered an opinion on the 14th of May, 1900 (Record, p. 116), and on the 16th day of May, 1900, passed a decree declaring that said paper-writing was not the last will and testament of Mary Beyer, and that she died intestate as to her real estate. (Record, p. 121.)

From this decree Louis Beyer, Sr., as well as the defendants below, Louis Beyer, Jr. and Helen B. Johnson, appealed to the Court of Appeals of the District of Columbia; and upon consideration thereof by the said court a decree was passed on the 6th day of December, 1900, affirming the decree of the said Supreme Court of the District. On the 20th day of December, 1900, the said Court of Appeals passed an order of severance. It appearing to said court that the said Louis Beyer, Jr. and Helen B. Johnson refused to join Louis Beyer, Sr. in his appeal to this Court.

ARGUMENT.

I.

THE EQUITY BRANCH OF THE SUPREME COURT OF THE DISTRICT OF COLUMBIA, HAD JURISDICTION TO ENTERTAIN THE BILL OF COMPLAINT.

This proposition is clearly established by the rule laid down by this Court in the Broderick Will Case, 21 Wall., 503. This Court, by Mr. Justice Bradley, speaking first of the general rule established both in England and this country, that a court of equity will not entertain jurisdiction of a bill to set aside a will or the probate thereof, where the ecclesiastical courts, or the probate courts in this country furnish adequate relief, said:

> "The public interest requires that the estate of deceased persons, being deprived of a master and subject to all manner of claims, should at once devolve to a new and competent ownership, and, consequently, that there should be some convenient jurisdiction and mode of proceeding by which this devolution may be effected with the least chance of

injustice and fraud, and that the result attained should be firm and perpetual.

"The courts invested with this jurisdiction should have ample power both of process and investigation and sufficient opportunity should be given to check and revise proceedings tainted with mistake, fraud and illegality.

"These objects are generally accomplished by the constitution and powers which are given to the probate courts, and the modes provided for reviewing their proceedings.

"One of the principal reasons assigned by the equity courts for not entertaining bills on questions of probate is that the probate courts themselves have all the powers and machinery necessary to give full and adequate relief."

In the city and county of San Francisco, where the Broderick will was probated, the orphans' court had full power and jurisdiction to probate both a will as to personal and real property.

Continuing Mr. Justice Bradley said in the above case:

"In view of these provisions it is difficult to conceive of a more complete and effective probate jurisdiction or one better calculated to attain the ends of justice and truth."

"It seems therefore to be the settled law in England that the court of chancery will not entertain jurisdiction of questions in relation to the probate or validity of a will which the ecclesiastical court is competent to adjudicate."

And concluding—

"IT WILL ONLY ACT IN CASES WHERE THE LATTER COURT CAN FURNISH NO ADEQUATE REMEDY."

Numerous English decisions sustain the above proposition that equity has jurisdiction to entertain a bill like the one at bar, and hold that the heir at law may have an issue *devisavit vel non*, or is entitled to have all technical obstacles to an ejectment removed. The court, however, is not bound to adapt one of these courses in preference to the other, but may take either in its discretion, so that it may direct an issue, and afterwards at the desire of the heir, changed the order, and direct an ejectment.

The present bill alleges, and the findings of the jury confirm, that the paper-writing was procured by fraud and undue influence; that the estate of the supposed testatrix was but an equitable interest in certain real estate. Is not a court of equity preeminently the proper tribunal for the consideration of these questions? Is not the jurisdiction of equity, in matters involving fraud, almost without limit? Richmond *vs.* Taylour, 1 P. Wms., 734.

The same principle was adapted in Barnesby *vs.* Powel, 1 Vez. Sen., 119.

A demurrer was sustained in Jones *vs.* Jones, 3 Mer. 161, not for want of jurisdiction, but because the bill did not disclose sufficient grounds for the interference of a court of equity and because the bill was multifarious. No stipulation had been filed in the Jones case assenting by all the parties to said cause that issues be sent to a jury for trial, but Sir W. Grant, Master of the Rolls said:

> "Although there may have been instances of an issue directed and the bill of an heir-at-law, where no opposition has been made to that mode of proceeding, yet I apprehend that he cannot insist on any such direction."

The case at bar falls within the exception, as the appellant expressly assented to the mode of proceeding.

The Lord Chancellor in Boyse *vs.* Rossborough, 6 H. L.

C., p. 42, commenting upon the opinion of Lord Eldon, in Pemberton *vs.* Pemberton, that there is great convenience in directing the heir to bring his ejectment, provided the defendant should not set up at law a term satisfied or unsatisfied, rather than by directing issues to obtain relief, said:

> "I cannot interpret this language as meaning anything else than this, that the usual and generally more convenient practice is to enable the heir to proceed by ejectment, *but that it is open to the court to direct an issue, if from any cause that course appears desirable.*"

The appellee avers in her bill that Mary Beyer conveyed in fee simple all the real estate of which she was siezed and possessed to certain trustees, and that said legal title to said real estate thereby conveyed has never been released, retransferred, or reconveyed by said trustees to said Mary Beyer, but is still outstanding in them. (Record, p. 2.)

That Louis Beyer, Jr., and Helen B. Johnson induced said Mary Beyer to affix her name to a certain paper-writing, when she was both mentally and physically unable to resist their importunities, and was not a free agent to dispose of her estate; that by said paper-writing the entire estate of Mary Beyer is devised to said Louis Beyer, Jr. and Helen B. Johnson; that soon after the death of said Mary Beyer, the said supposed devisees, Louis Beyer, Jr., and Helen B. Johnson, conveyed a portion of said real estate, of said supposed testatrix to Louis Beyer, Sr., the appellant, in consideration of the said grantee dismissing a certain caveat he had theretofore filed, protesting against the probate of said paper-writing; that said grantee on May 12, 1897, conveyed to the defendant trustees all of the property conveyed to him by the said supposed devisees, Beyer, Jr., and Johnson, which property is a portion of the said real estate and equity of

redemption of which the said Mary Beyer died, siezed or possessed.

It is submitted that the above averments sufficiently set forth that said estate of the supposed testatrix is an equitable estate; that said conveyance to the appellant sets up said paper-writing as a will of real estate, and that said appellant or his grantees are in possession of said real estate.

It was declared in the case of Armitage *vs.* Wadsworth, 1 Madd. 187, that *but for the averment of there being outstanding terms* such a bill would be a mere ejectment bill by an heir-at-law out of possession praying an issue, stating no impediment to the assertion of his right at law, and therefore not sustainable. In this case more than outstanding terms are alleged to give the court jurisdiction.

And so this Court held in the case of Ellis *vs.* Davis, 109 U. S., 499, where an heir-at-law filed a bill in equity to set aside the probate of a will in Louisiana, to recover the real estate and an accounting from an adverse party in possession under the will, relief was denied on the ground that the heir claimed the legal title to the real estate, the recovery of which was provided for in an action of revendication, giving the heir a plain, adequate and complete remedy at law.

A similar doctrine was laid down by this Court in the case of Traver *vs.* Traver, 9 Peters, 180. Here the heir-at-law filed an *original* bill in equity to set aside the probate of a will. This Court did not hold that a court of equity has no inherent power to set aside a will or the probate thereof, but that the laws of the State (Alabama) have provided full and adequate relief by a different procedure to accomplish the same ends, namely, by an *appeal* within five years from the tribunal which probated the will. While the foregoing citations sustain the proposition that a court of equity will not take jurisdiction to set aside a will in cases where the orphans' court has full power and jurisdic-

tion to admit to probate a will of real estate; they also clearly decide, that a court of equity will act in cases where the orphans' court is not vested with the power and jurisdiction necessary to give adequate relief; and where the right of appeal does not exist; and where the common law can give no relief in the trial of wills of real property, by the action of ejectment.

The appellee needs, therefore, only to ascertain, *first*, whether the Supreme Court of the District of Columbia, holding a special term for orphans' court business had power and jurisdiction to admit to probate a will as to real estate at the time of the death of the said Mary Beyer, to-wit, July 26th, 1896; *second*, if no such jurisdiction existed in the said orphans' court, whether the appellee at any time possessed a sufficient legal title to sustain an ejectment.

As to the power of the orphans' court in this district to admit to probate a will of real estate in 1896, this Court, speaking by Mr. Justice Gray, in the case of Campbell *vs.* Porter, 162 U. S., 478, decided that by the common law and the old law of Maryland, at the time of the establishment of the District of Columbia, wills, so far as real property is concerned are not admitted to probate in the Orphans' Court of the District.

This Court cites with approval the language of Mr. Justice Johnson in Darly *vs.* Mayer, 10 Wheat, 465, 471, 472, wherein he construes the older laws of the State of Maryland concerning wills, as amended and codified by the statute of 1798, chapter 10, and published in 2 Kilty's laws; concluding Mr. Justice Johnson says:

> "But it is equally true that the act does not authorize the registering of any will without probate. Nor does it in any one of its provisions relate to the probate of any will except wills of goods and chattels."

Congress passed no legislation, nor in any way supplimented the Maryland statute of 1798, until the act of July 9th, 1888, chapter 597, relating to the record of wills in the District of Columbia, which was declared an act of evidence and not of jurisdiction. Says Mr. Justice Gray in Campbell v. Porter:

> "The act assumes the probate to have been lawfully made; and it no more undertakes to define or regulate the jurisdiction of the courts of probate of the District for the future, than it does the jurisdiction of those courts in the past, or the jurisdiction of the courts elsewhere, whose proceedings filed here are equally made evidence."

The appellant, doubtless, concedes that this was the status of the law relating to wills of real estate in force in the District, *until the passage of the Act of June 8th, 1898*, which conferred plenary jurisdiction upon the Supreme Court of the District of Columbia, holding a special term for Orphans' Court business, to hear and determine all questions relating to the execution and to the validity of any and all wills devising any real estate within the District of Columbia, and to admit the same to probate and record in said special term.

It seems, therefore, conclusive, that the Orphans' Court o this District, had *no jurisdiction* to admit to probate and record the said paper-writing of the said Mary Beyer, as a will of real estate. Nor could the appellee have offered said paper-writing for probate in said Orphans' Court after the passage of said act of June 8th, 1898, for the sole purpose of attacking it, when she denied its validity, though she might have contested its validity, if any of those interested under said will had offered it for probate as a will of real estate, which course, however, seems to have been cautiously avoided by the devisees thereunder.

II.

Could the Appellee at any time have prosecuted an ejectment suit at common law against the Devisees and their Grantee in possession of said real estate?

In this respect the appellee was confronted with the fact that the decedent was the owner of but an equitable title. The said Mary Beyer had but a mere right of an equity of redemption to the real estate she attempted to devise. The legal title having been conveyed by the said Mary Beyer, and this appellant, to the trusees therein named, it would seem that said fee simple title remained in the said trustees until the "sale," "conveyance," and "payment," as thereinafter provided, namely: "on the full payment of said notes and interest thereon and all sums advanced or expended in respect of this trust, *to RELEASE and RECONVEY in fee at the expense of the releasee unto the said Mary Beyer* or the said person or persons then claiming under her the aforesaid land and premises." (Record, p. 6).

It is conceded that the payment of said notes has not been made. So long as the legal fee simple title to said real estate is vested in said trustees, there can be no doubt that the appellees' title to the real estate in question, remains but a mere right of equity of redemption.

The appellant contends, however, that the appellee could maintain the action of ejectment on her title under the deed of trust, and supports his proposition by the case of George Creek's Coal and Iron Co., *vs.* Detmold, 1 Md., 235. True the Maryland court held that such a title as therein described would not be a bar to an ejectment, and said: "Upon the whole, we are of the opinion, *under such a mortgage as that in this case*, that the mortgagor can maintain ejectment against a stranger who rests his defence entirely on posses-

sion and an outstanding title in the mortgagee. The fact is, that the mortgage described in the Maryland case and the deed of trust in the case at bar, are quite dissimilar. Whatever the theory of the law relating to covenants of a mortgage to redemise the fee title to the mortgagor may be, the fact is, that the deed of trust in this case expressly retains the fee title in the trustees *until the full payment of said sum secured thereby.*" (Record, p. 6). However, the case cited is of minor importance as an authority, when this court has spoken upon the very question in a case which arose in this District. Bank of the Metropolis *vs.* Guttschlick, 14 Peters, 29.

The court distinguishes between a mortgage and a deed of trust, declaring that the principle applies more forcibly in the case of a deed of trust; and bases the reasoning on the fact that a mortgage is under the protection of a court of equity. That a decree is necessary to procure a fore-closure, and that even then, the mortgagor is allowed a short time to come in and get an extention in which he may redeem the premises, by paying the debt, while in the case of a trust, a court of equity seldom interferes. *The only right of the grantor in the deed, is the right to whatever surplus may remain after the sale, of the money for which the property is sold.*

In this case, it appears that the bank claimed under a deed from one Kerr, who sold the lot in question as trustee, under a trust from one Orr, made to secure debts, which deed was executed on the 8th of September, 1819. Orr had on the 6th of August, 1818, conveyed same lot, in fee simple, to one Elgar, as trustee, to secure certain debts, with power of sale, in event that one Lane, an endorser of a note secured by the last deed should be sued, which event occurred in 1820. "It appears that at the date of the agreement the bank was not seized of the fee simple which it contracted to convey. If the deed of trust to Elgar be consid-

ered as a mortgage, *then the moment it was executed the legal estate in fee simple was in Elgar*, subject to be defeated upon performance of the conditions, and so continued in him, from that time down to the year 1835, when, under the trust deed, he sold and conveyed the lot to the Patriotic Bank which purchased at the sale.

Refering to the action of the Bank, this court said:

> "There was then a good cause of action, on the ground that the bank had not the fee simple which it contracted to convey."

This Court has held, in the case of Morsell *v.* The Bank, 91 U. S., 357, that a judgment against the grantor of a deed of trust was no lien upon the real estate.

If a judgment had been recovered against Mary Beyer in her life-time, an execution at law could not have been levied upon it, nor would any proceeding, short of a bill in equity, be able to reach her equitable title to said property.

Morsell *vs.* First National Bank, 91 U. S., 357.
Lincoln *vs.* French, 105 U. S., 615.
Van Ness *vs.* Hyatt, 13 Peter, 298.
Bank of Metropolis *vs.* Cuttschlick, 14 Peter., 19.

It is clear, therefore, that there was no jurisdiction in the probate court for the recovery of the land by the heir-at-law to which she was legally entitled by the statute in force in this District at the death of the said Mary Beyer; that the title in and to said land was of an equitable character, and that the legal estate vested in the said trustees. It seems clear, beyond a doubt, that the said appellee could not proceed in an action of ejectment against the devisees under the alleged will of the deceased, the grantor in the deed of trust. See 105 U. S., 614; 10 Wallace, 519; 91 U. S., 357; 13 Peter, 298; 14 Peter, 19.

Relief being, therefore, denied to the heir-at-law under the law in force in the District of Columbia up to the day

of filing this bill both in the probate court, as well as in the court of law, it cannot be doubted that, if the complainant sets up good grounds for filing a bill in equity and alleging that there is a deed of trust outstanding, that she would be entitled to come into a court of equity and have it removed so that the question could be fairly tried in an ejectment suit by a jury, or to have issues framed and sent to a jury for trial. EQUITY WILL NOT SUFFER A RIGHT TO BE WITHOUT A REMEDY.

III.

AS TO EFFECT OF THE STIPULATION OF JUNE 20TH, 1899.

In the case of Strong *vs.* Willey, 104 U. S., 5 2–15, this court held that it was too late to object to the manner chosen of having a jury trial after the ruling has been made by the court; and it therefore follows that when a party to a cause *leads the court to adopt a certain mode of procedure* in a case which the court had the discretion to adopt or not to adopt, the party agreeing to such mode of procedure should not be allowed to object to the course of procedure because the result of the course has been adverse to them. Counsel must *in all fairness to the court* as well as the opposite party explain away the question of consent as to the mode of procedure before launching out upon the course selected. See Reynes *vs.* Dumont, 130 U. S., 354; Kilburn *vs.* Sutherland, 130 U. S., 514; Tayler *vs.* Moses, 13 U. S. 428.

It cannot be seriously contended that the appellant, after interposing a demurrer to the bill, and after the hearing of said demurrer, and while the *result of that hearing* is under consideration by the court, can stipulate that issues be framed under the bill (some of the defendants below having answered the bill in which all the

material allegations were denied and contested) without expressly waiving the full force and effect of said demurrer.

Would it not be a fraud upon the Court to allow the appellant now to insist on objecting to that to which he consented in the court below? The Solicitor-General, in Boyse *vs.* Rossborough, cites Chamley *vs.* Dunsany, in which Lord Eldon condemned such a practice, saying:

> "When those opportunities are passed by, are we not entitled to say the point was waived in the court below in order to make it the subject of appeal here."

The stipulation of June 20th, 1899, expressly provides that "certain issues be tried by a jury of the Circuit Court, and that the findings by said jury upon said issues shall be returned to this Court; whereupon a decree *shall be entered in accordance with said findings.*"

The stipulation further provides that "all rights of appeal as in cases of issues from the Orphan's Court, being hereby reserved.

No such appeal as in cases of issue from the Orphan's Court was taken by either party, which possible right became barred by the lapse of time allowed by the rules of the Supreme Court of the District of Columbia, within which to perfect said appeal npon a bill of exceptions.

The verdict of the jury was rendered on Monday, December 11th, 1899. (Record, p. 20.) No appeal nor bill of exceptions having been presented to the trial court, all the parties to the cause, on the 8th day of March, 1900, stipulated that the stenographic report of the testimony and proceedings had at the trial of the above stated issues before Mr. Justice Cole and a jury, etc., be considered by the Court as a part of the record on the hearing in the equity court of this cause.

This stipulation conferred no new power upon the equity court, further than to consider all the proceedings had be-

fore the trial court and jury, which was intended to enlighten the conscience of the Chancellor and grant a decree in accordance with the prayers of said bill, and the findings of the jury.

The appellant contends that the purpose of the stipulation of June 20th, 1899, was to save time and expense, in that he expected the jury to find in favor of the will, and thus speedily end the litigation; but in equity and good conscience does not that expectation give rise to an obligation that, if said issues are found against the will, said litigation should likewise speedily end?

He who seeks equity must do equity.

If it is possible to give the stipulation the construction now sought to be put upon it by the appellant, would it not permit him to take advantage of his own wrong?

We submit therefore it is now too late for the appellant to say that the issues framed and manner chosen for the trial by jury are not lawful.

This court said in Strong *vs.* Willey, *supra:*

> "The reference of the matter in dispute to the arbitrator, coupled with the agreement that his award should be made the basis of a decree in the suit, is clearly a waiver of the objection that the remedy was at law and not in equity, if any such objections in fact existed, which we are by no means inclined to admit."

IV.

Whether, upon the facts, the verdict of the jury ought to be sustained.

If there should be the slightest doubt upon this proposition, a brief consideration of the testimony will dispel it.

The supposed testatrix was sixty-five years of age; for

some time past had been afflicted with a dreadful disease; at or about the time of the alleged execution of the three separate paper-writings she was so ill that she did not seem to recognize anyone; she could not move about in her bed; she was stupefied by the administration of morphine and champagne, not to cure but to relieve her, ever since she had taken her bed; she was gradually growing worse; her voice was so weak that one had to put his ear to her mouth to understand her; she told the witness "the medicines they were giving her were doing her no good; most of it was morphine to deaden the nerves, but nothing to build her up"; she could not sit up in bed; that for two weeks before her death she could hardly speak or move; when she was too sick to converse with her spiritual adviser; when the man who drew her will was engaged with a street-paving concern, though he had once read law to some extent; he occupied an office right over that of the principal beneficiary, who had requested him to come and draw the will; he had never before seen Mary Beyer; the first thing he said when he saw her was, "Mrs. Beyer, I understand you want to make a will." He drew a will, makes Louis Beyer, Jr., whom he had known for 15 years, sole beneficiary; she signs the paper; he discovers an imaginary error, rewrites the will, returns to her death-bed, reads it over to her, makes other changes in the will; he take it back to his office, makes Mrs. Johnson an equal beneficiary; returns to her the following day (Tuesday), and she signs her third will within forty-eight hours. She, unable to move in her bed, speak even in a whisper, sustained on morphine and champagne, tells the scrivener "she did not want to leave her husband the property because he had already squandered $30,000 of the money she had made, * * * and she was afraid that if she left the property to him, for life even, they might do something with it—entangle it to further his inventions that he was supposed to be carrying on at that

time." She "hoped the two beneficiaries and her husband would live in the house as long as he lived, but he should not restrict the beneficiaries in the sale of it." In the first will she intended to leave the property to Louis Beyer, Jr., *absolutely*. He was to be executor without bond. Louis Beyer, Jr. was present. The scrivener, not a practicing lawyer, a total stranger to Mary Beyer, knew Louis Beyer, Jr. 15 years; knew that he was the executor under the will, and equal beneficiary; their offices in the same building, yet retains the paper until four days after her death. The supposed beneficiaries voluntarily deliver an executed deed to the surviving husband for almost the whole estate on the 31st of July, 1896, only one day after he hears of the existence of the will.

That Louis Beyer, Jr., on the 20th of August, 1896, applied to the court to have his name changed from Charles Louis Smith to Louis Beyer, Jr. Her physician testifies that he is a "specialist in everything," an "all around expert." That when he witnessed the paper, the disease was progressive and incurable.

The subscribing witness, Smith, referring to the second will, on page 70 of the record, says: "When Mr. Brennan came, he proceeded to read a paper which he had prepared, and which as the reading progressed, observed was a draft of a will, by Mrs. Beyer; Mr. Brennan read the will through and when he had concluded the reading, Mrs. Beyer said: "Where is Helen? Where is Helen? You have left Helen out; Helen is to go into the will." Mr. Brennan said: "Who is Helen?" She said. "Why my niece, Mrs. Johnson, she is to have a share with Louis." Does this not show her state of mind as compared with the day previous? That she was given narcotics to relieve her pain, anodyne, in form of opium, powdered opium or morphine. The witness appears at Mrs. Johnson's request; on neither of the three executions of said paper was the husband present; but the

beneficiaries. She asked Louis Beyer, Jr. what her husband would have in event of her dying without a will; she found out that the sisters would be her heirs, without a will. Louis Beyer, Jr., first learned of the contents of the will, the third day after the funeral. He had no knowledge of the contents of the will until August, 1896. (Record, p. 81 and 82,)

"When Mr. Beyer received knowledge that there was a will in existence, he made things very disagreeable with both Mrs. Johnson and me and not as a matter of compromise, but as a matter of duty we both deeded not the rear part, as expressed here, *but nearly all except the home site he had the froutage on Brightwood Avenue as well as the rear, with its improvements by six two-story brick dwellings;*" yet after his deed was given the beneficiaries found things so unbearable that they left the homestead; after he finally vacated the homestead they both returned. The husband was disappointed. He had supposed the property would go to him.

She never intended to make a will until she learned that her husband would not inherit the property. She disinherits her sister whom she had lately given a most affectionate and final farewell. (Record p 34.) *She made the will to protect her husband, and disinherited him of the property which they accumulated by their joint labor.*

The appellant was a party to and represented by counsel at the trial of the issues before the jury, yet he did not take the stand to tell the jury what *he knew* about the facts. He knew Mary Beyer better than any one else; he lived with her 45 years; knew the relations existing between the deceased and the supposed beneficiaries; knew what were the trial issues then being tried, yet he did not deny a single allegation contained in the bill, nor did he take the stand to protect the sacred memory of the deceased; nor the good name of those charged in the issues with procuring the paper-writing by fraud, circumvention or undue influence.

V.

THE FINDINGS OF THE JURY AND THE DECREE OF THE CHANCELLOR WERE ALL RIGHT.

The record shows that the jury reached the verdict only after careful deliberation; the trial court, who saw and heard each witness testify, was well qualified to pass upon the motion for a new trial, overruled the same, and certified the findings back to the equity court.

The Chancellor patiently heard all the pleadings, testimony and proceedings had before the law court, and in a carefully prepared opinion, adopted, ratified and confirmed the findings of the jury. (Record, p. 116). The entire record of all the proceedings was presented to the Court of Appeals of the District. That Court having carefully considered the same, confirmed the decree of the Chancellor. (Record p. 133-142).

GENERAL STATEMENT OF THE FACTS.

WHO WERE THE HEIRS-AT-LAW OF MARY BEYER?

No children having been born to the said Mary and Louis Beyer, Sr., her real estate would descend to her three sisters and their descendants.

Caroline LeFevre, the present appellee, and Mrs. Maus, the mother of Helen B. Johnson, alone survived the deceased. Charles Louis Smith, known in the record as Louis Beyer, Jr., and Helen C. Fenton, are the only descendants of Mrs. Smith, a pre-deceased sister of said Mary Beyer. (Record, p. 97.)

The record shows that the said decedent had often been importuned by the niece, Helen B. Johnson, to make a will, thus prevent the property falling into the hands of the husband. She declined, however, until "she found that

Mr. Beyer would not inherit the property she changed her mind." (Record, p. 92; also, p. 93.)

Witness JOHNSON:

Q. Do you remember whether you arranged for any of the witnesses to be present?

A. She asked me to ask Dr. Smith. She thought about making a will and I asked about it, and the doctor said if she wanted the husband to keep the property, she should have made the will when she bought the property, and I told her that.

This was the same day the first will was made. Up to that time both she and her husband thought he would be her heir. (See Record, p. 95.)

Q. What did Mrs. Beyer say in her conversation about Mr. Beyer in case she did not make a will?

A. That he would be her heir-at-law.

Q. She gave that as her reason why she did not make a will?

A. Yes, sir.

She then makes three wills in 48 hours, devising all the property she then owned, which represented the fruits of their joint labors for 45 years. In the first paper, Sunday, July 12, 1896, she leaves it all to Louis Beyer, Jr., (Charles Louis Smith,) whose sister, Mrs. Fenton, was "awarded" five dollars.

Mr. Brennan, the scrivener, who had never before seen the said Mary Beyer, with commendable forethought, takes the will, devising an estate of $25,000 to his friend of 15 years' acquaintance, to his office, in the same building occupied by his friend. He does not seal and sacredly guard it, but takes it out the following day, rereads it, finds an imaginary error, in that the word "heirs" is omitted, and lest his friend gets but a life estate, he rewrites it and

meets the witnesses in the death-chamber for a re-execution of the paper. This is Monday, July 13th, 1896. (See Record, p. 54.)

Q. How many times did you see Mrs. Beyer before she executed the will?

A. Never saw her before—that is before she executed that will. I saw her twice.

Q. Whereabouts?

A. At her house.

Q. Who was present?

A. Dr. Smith and Mr. Sullivan on *one occasion*, and on *two other occasions* there was Dr. Smith, Dr. Atkinson and I.

Note what Brennan says about this first will. He found a mistake in the first paper, so he burned it up on the Tuesday following at the residence of Mrs. Beyer. (Record p. 54.)

Q. What became of the first paper?

A. I burned it myself.

Q. Whereabouts?

A. I think it was at the residence of Mrs. Beyer.

He flatly contradicts this assertion on page 89 of the Record. He says:

Q. Can you tell us where it was that you burned the first paper which you prepared and which you stated on yesterday you did burn?

A. After the execution of the present will by Mrs. Beyer, I tore the written will up, the will that was written on Sunday afternoon, tore it up. I put it in my pocket, and after I got to my office I burned it up in the grate.

Again he is contradicted on page 59 of the Record. He says on Monday when he returned with the witnesses and with a will already for her signature, which was identical to the one she had signed on Sunday, excepting the word

heirs added, she said: "In as much as the will has to be re-written, you might as well leave the property to Louis Beyer (her son) and Helen B. Johnson—put Helen Johnson in the will."

Dr. Smith, on page 77 of the record, says: "That is one thing that I do remember distinctly—that Mrs. Beyer exclaimed positively and with more emphasis than I thought she was capable of 'Where is Helen, you have left Helen out of the paper, I want her to go in'—and Mr. Brennan asked, who is Helen? and she said, 'My niece, Mrs. Johnson, she is to share equally with Mr. Beyer.'" Then again Brennan was asked in reply to Dr. Smith's statement about Helen going into the will. (See p. 91, of Record.)

Q. Dr. Smith has testified that Mrs. Beyer cried out on Sunday "Where is Helen?" and you asked who Helen was?

A. I do not remember an incident of her asking where Helen was.

And so there are many flat contradictions among the witnesses who testified in support of the will, to which I shall refer at the hearing.

The witnesses, Mrs. Stone and Fannie Perry, in no instance contradict themselves, but they are clearly corroborated in many instances by Mrs. Johnson and Mr. Beyer. (Record, p. 44.)

Witness PERRY:

Q. What did Mrs. Johnson say to Mrs. Beyer, and what did Mrs. Beyer say to Mrs. Johnson?

A. I have heard Mrs. Johnson ask Mrs. Beyer to make a will, but Mrs. Beyer said she would not make a will; that everything would be left to Mr. Beyer just as it was and for them to stay with Mr. Beyer and treat him right, and when he died he would do right by them.

Q. What did Mrs. Johnson say then?

A. This is the way you are going to treat me after I have been working for you all these years, and this will be all the thanks I'll get for doing it.

Mrs. Johnson (Record, p. 95) says: Mrs. Beyer said to Mrs. Johnson that Mr. Beyer would leave the property to her and Louis.

Is it a Natural Will?

The evidence is conclusive upon the following facts:

That the relations between this appellee and the deceased were warm, friendly and affectionate; that the relations between the appellant and the deceased were friendly and thoughtful; that while the property stood in her name it was her desire that he should have the benefit of it during his life; that when she learned that a will was essential to create such an interest in him, she makes a will for his sole benefit, with the understanding that if Mrs. Johnson and Beyer treated him right he would do right by them.

He never hears of the existence of this will until about July 30, 1896. On July 31, 1896, he is given the bulk of the estate by a deed of Mrs. Johnson and Mr. Beyer, Jr., (prior to *either of them being informed*, of the existence or contents of the will,) "so quickly he did not have time to be dissatisfied." (Record, p. 99.)

The appellant says these darling children were to hold the property for him, and keep him in check from spending the estate. In other words Mrs. Beyer placed $25,000 worth of property into their hands, absolutely, without bond or liability, with absolute power to dispose of it if they saw fit.

The facts are, that these darling children in whom it is said Mrs. Beyer had such supreme confidence concocted a scheme whereby they gained absolute control of the estate, and give the surviving husband, not the protection and

comforts of a home, but cast his clothes and trunks upon the street. (Record, p. 32, bottom.)

Would Mary Beyer knowingly confide her estate into such guardians to protect him, who, was the superior object of her bounty?

AS TO THE EFFECT OF THE STIPULATION IN THE CASE.

The appellant can not with good grace, be heard upon the question that the stipulation has a different effect upon these proceedings than its plain, adequate language meant to convey when it was entered into and adopted.

It is not competent for him now to take these objections after he finds the verdict against him. He assented to the issues, took his chance, and must bear the burden with the same grace he would have enjoyed the benefits.

I respectfully submit that this appellant, having alone filed his motion for a new trial before the law court, he recognized and re-adopted the mode of procedure mapped out in the original stipulation itself. By his motion for a new trial he re-assents to the very issues framed, and approves of the course adopted. This question was fully discussed in the Boyse *vs.* Rossborough case, 6 House of Lords Cases, p. 2, in which case all the facts are so strikingly similar, and the principles so well discused and clearly defined as to establish a strong precedent for these proceedings.

The Chancellor below also took this view, and said, (Record, p. 120).

The question of jurisdiction is, after all, not the issue as contended for by the appellant. It is purely a question of discretion whether the Chancellor shall direct an issue, *devisavit vel non* or remove an impediment to an ejectment.

I submit that when the appellant came forward and assented to have certain issues sent to the law court for trial by jury, the Chancellor had full jurisdiction to approve the

order certifying the issues. Boyse *vs.* Rossborough, 6 House of Lords Cases, 2.

AS TO THE MOTION FOR A NEW TRIAL IN THE COURT OF EQUITY.

While the record does not show a formal motion for a new trial renewed in the equity court, it is a fact, however, that the Chancellor carefully examined, weighed and considered all the testimony and proceedings in the law case, as is fully set forth in his opinion. He said on page 120 of the record, after expressing some doubt whether the parties having stipulated to send issues to a jury, and that a decree may be entered in accordance with said findings, can be allowed to ask the court to disregard the verdict, unless some material error has been committed in the trial:

> "Looking at the case from every standpoint, I have reached the conclusion that the verdict was one which the evidence warranted the jury in finding."
>
> "There is some conflict in the evidence, and there are some inferences of fact which would support the verdict, and which may fairly be drawn by a jury from the facts proven, and *I cannot convince myself* that any injustice has been done, *either by the circuit court or the jury* in the conclusion reached."

Surely this language should satisfy anyone that the Chancellor reached his just and proper conclusion only after carefully considering and weighing all the evidence and proceedings had before the law court, which testimony and proceedings were, by stipulation of all the parties, substituted for a new trial, or new testimony before the Chancellor, and sincerely submit that it may be pardonable to characterize the present contention of the appellant as decidedly trivial, if not unfair.

THOSE WHO BEST KNEW THE TRUE STATE OF FACTS RAISED BY THE ISSUES, REFUSED TO FURTHER CONTEST THE MATTER. The appellant stands in this court alone; never having controverted a single allegation of the appellees' bill of complaint, save those raised by the issues which he, by his solemn stipulation, entered into with his opposing counsel, submitted to the Court his *good faith* that a "decree shall be entered in accordance with said findings."

I submit the decree is proper and just, and it should be affirmed.

CLAYTON E. EMIG,
Attorney and Solicitor for the Appellee.



Supreme Court of the United States.

No. 237.—October Term, 1901.

Louis Beyer, Appellant, vs. Caroline Le Fevre. } Appeal from the Court of Appeals of the District of Columbia.

[May 19, 1902.]

This was a bill filed in the Supreme Court of this District on April 7, 1899, to set aside the following will:

"In the name of God, Amen.

"I Mary Beyer of the city and county of Washington and District of Columbia being now of sound and disposing mind, do make, ordain, publish and declare this to be my last will and testament: That is to say, first after all my lawful debts are paid and discharged the residue of my estate, real and personal I give, devise, bequeath, and dispose of as follows: to wit all the furniture and personal effects now in the home, number 2258 Brightwood avenue I desire to remain there during the life of my husband Louis Beyer or so long as it remains the family home and in the event of the house not being retained as a family home then the furniture and all other personal effects belonging to me are to go to and belong to my nephew and adopted son born Charles Lewis Smith but adopted by me at birth and thereafter always called Louis Beyer, Junior.

"To my sister Elizabeth Kersinski Maus of Philadelphia Pa. I leave five dollars.

"To my sister Caroline Kersinski Lefevre of Brookland D. C. I leave five dollars.

"To my niece Helen J. Fenton of Washington, D. C., I leave five dollars.

"All the rest and residue of my estate, real, personal and mixed, of which I may die seized and possessed, whatsoever and wheresoever, of what kind, nature and quality soever the same may be, and not hereinabove given or disposed of, I hereby give, devise and bequeath, unto my nephew and adopted son, Louis Beyer, Junior, and Helen B. Johnson my niece in equal shares, as tenants in common and not as joint tenants, their heirs and assigns, absolutely and forever.

"Having full faith and confidence in the honesty, integrity and affection of my said adopted son and of my said niece, I leave them all the property stated herein knowing that they will provide a home and home comforts for Louis Beyer, Senior during his natural life but this is not to be construed to mean that said Louis Beyer, Junior and Helen B. Johnson are to be restricted from disposing of any or all of the property if their

judgment so dictates but in the event of disposing of all of the property before the death of Louis Beyer, Senior they are to always maintain a home and home comforts for my beloved husband, Louis Beyer, Senior.

"Likewise I make, constitute, and appoint, my adopted son born Charles Lewis Smith but always known as Louis Beyer, Junior to be executor of this my last will and testament, hereby revoking all former wills made by me and I request that he be not required to give bond as such executor.

"In witness whereof I have hereunto set my hand, subscribed my name and affixed my seal this fourteenth day of July in the year of our Lord one thousand eight hundred and ninety-six in my home at Washington, D. C.

MARY BEYER. [SEAL.]

"The above-written instrument was subscribed by the said Mary Beyer in our presence and acknowledge- by her to each of us, and she at the same time published and declared the above instrument so subscribed to be her last will and testament, and we at the testator's request and in her presence and in the presence of each other have signed our names as witnesses hereto and written opposite our names our respective places of residence.

P. J. BRENNAN,
1418 *F St. N. W., Washington, D. C.*
WADE H. ATKINSON,
707 12*th St. N. W., Washington, D. C.*
THOMAS C. SMITH,
1133 12*th St. N. W., Washington, D. C.*"

The parties named as defendants were Louis Beyer, the husband of the testatrix; Louis Beyer, Junior, a nephew; Helen B. Johnson, a niece; Louis Beyer, Junior, as executor, and Meyer Cohen and Adolph G. Wolf, trustees in a deed of trust executed by the husband of the testatrix on May 13, 1897. The ground of attack was the alleged mental incapacity of the testatrix and undue influence on the part of Louis Beyer, Junior, and Helen B. Johnson. The personal property belonging to the testatrix was of little value, but she owned certain real estate, subject to a trust deed, which in the bill was alleged to be of the value of $25,000 over and above the encumbrance. Louis Beyer, Junior, and Helen B. Johnson, answering separately, denied mental unsoundness and undue influence; alleged that the will was duly executed, and challenged the jurisdiction of the court, sitting as a court of equity, to entertain the bill. The trustees pleaded that the bill stated nothing entitling the complainant to relief in equity, and averred that their deed of trust was a valid lien. Louis Beyer demurred generally. On June 20, the court having made no ruling upon the question of jurisdiction, the parties signed this stipulation:

"It is hereby stipulated by and between the parties to this cause this 20th day of June, 1899, that the court may make an order certifying certain issues, to be named in said order, to be tried by a jury of the Circuit Court, and that the findings by said jury upon said issues shall

be returned to this court; whereupon a decree shall be entered in accordance with said findings, all rights of appeal as in cases of issues from the orphans' court being hereby reserved."

And thereupon the court made this order:

"Ordered by the court this 20th day of June, 1899, (the parties to this cause consenting hereto,) that the following issues to be tried by a jury be, and they hereby are, certified to the Circuit Court, to wit:

"First. Was the said Mary Beyer at the time of the alleged execution of the paper-writing bearing date the 14th day of July, A. D. 1896, and purporting to be her last will and testament, of sound and disposing mind, memory and understanding and capable of executing a valid deed or contract?

"Second. Was the execution of the said paper-writing bearing date the 14th day of July, 1896, and purporting to be the last will and testament of the said Mary Beyer, procured by fraud, circumvention or undue influence practiced or exercised upon the said Mary Beyer by Louis Beyer, Jr., Helen B. Johnson, or by either of them or by any other person?

"Third. Were the contents of the paper-writing bearing date July 14th, 1896, and purporting to be the last will and testament of said Mary Beyer, known to her at the time of the alleged execution thereof?"

This order was assented to by all the parties. In pursuance thereof the case came on for trial before Mr. Justice Cole and a jury, and the jury, after hearing the testimony and the instructions of the court, answered each of the questions in the affirmative. A motion for a new trial was overruled by the presiding judge. A stipulation was entered into by the parties that the full report of the testimony and proceedings had before Mr. Justice Cole and the jury should be produced, read and heard by the equity court as a part of the record on the hearing in that court and in the appellate court to which the cause might be carried by either or any of the parties. Thereupon a full report of the proceedings was presented to Mr. Justice Barnard, holding the equity court, who, on May 14, 1900, filed an opinion sustaining the verdict of the jury, and directing a decree in accordance with the prayers of the bill. From that decree Louis Beyer, Louis Beyer, Junior, and Helen B. Johnson appealed to the Court of Appeals. On December 6, 1900, the Court of Appeals affirmed the decree. From that decree Louis Beyer, a severance being had, appealed to this court.

Mr. Justice BREWER delivered the opinion of the Court.

The appellant contends, first, that the Supreme Court of the District, sitting as a court of equity, had no jurisdiction of this cause; second, that the verdict of the jury was not sustained by the evidence; and, third, that there was duress and coercion of the jury by the court, which resulted in an unjust verdict.

We pass the first question with the observation that, whatever might have been the conclusion if the defendants had stood upon their challenge

of the jurisdiction, the agreement of the parties to submit certain questions to a jury, the trial before the jury and the stipulation for returning the testimony there taken to the equity court for consideration by the judge thereof, must be held a waiver of the objection to the jurisdiction. Under the Federal system the same judge may preside whether the court is sitting in equity or as a common law court. While the pleadings and procedure are dissimilar and the rights of the parties, especially in respect to juries, are different, yet in many cases a party who appears in one branch of the court and consents to a hearing and adjudication, according to the practice there prevailing, of an issue presented by the pleadings and in respect to a subject-matter, which is within the general scope of its jurisdiction, may be estopped from thereafter and in an appellate court challenging such jurisdiction. (*Reynes* v. *Dumont*, 130 U. S. 354, 395.) This is such a case. The determination of the title to real estate is within the scope of the general jurisdiction of a court of equity. The issue of undue influence in respect to any transaction such a court is competent to determine. The proceeding consented to, and in fact had, was practically the trial of a feigned issue out of chancery. It is too late now to raise the question of jurisdiction.

Passing to the second question, we premise by saying that it is well settled that when the trial and the appellate courts agree as to the facts established on the trial, this court will accept their conclusion and not attempt to weigh conflicting testimony. (*Stuart* v. *Hayden*, 169 U. S. 1, 14, and authorities cited in the opinion.) And this rule of concurrence with the conclusions of the trial and appellate courts is given more weight when in the first instance the facts are found by a master or a jury. (*Furrer* v. *Ferris*, 145 U. S. 132, and cases cited in the opinion.) These propositions we have often affirmed. At the same time there has always been recognized the right and the duty of this court to examine the record, and if it finds that the conclusions are wholly unwarranted by the testimony it will set the verdict or report aside and direct a re-examination. And after having carefully examined the record in this case we are constrained to the conclusion that there is no testimony which justified the answer returned to the second question. On the contrary, if a will is set aside upon such a flimsy showing as was made of undue influence, few wills can hope to stand.

The facts are these: The testatrix was a woman sixty-five years of age; had been married forty-five years, but was childless; her relations with her husband and sisters were pleasant; her near relatives were two sisters, Caroline Le Fevre, the present appellee, and Mrs. Maus, the mother of Helen B. Johnson. Another sister had died many years ago, leaving two children, Charles Louis Smith (known in the record as Louis Beyer, Junior) and Helen C. Fenton. Louis Beyer, Junior, while a little child,

and on the death of his mother, was taken by the testatrix and brought up as her son. There does not appear to have been any formal adoption, but he went by the name of Louis Beyer, Junior, and was recognized and treated as her son. He was twenty-seven years old at the time of her death. Helen B. Johnson was, as stated, the daughter of Mrs. Maus, a sister of testatrix. She, too, lived with the testatrix the most of her life, although it does not appear that she had been recognized as a daughter. The testatrix died of cancer in the abdomen. The first indications of trouble were in December, 1893, though at that time the appearances were of an ordinary case of indigestion, and the fact that it was cancer was not developed until some time in the early part of 1896, the year in which she died. In the month of June of that year she went on a visit to the home of Helen Johnson's mother-in-law, twelve miles south of Richmond. She returned about the first of July, was about the house for a week or so after her return, and then took to her bed, dying on July 26. When spoken to, at different times prior to her visit to Richmond, about making a will she had declined, saying she intended the property should go to her husband; but being advised, either before or after her visit to Richmond, that in case she died without a will the property would go to her sisters and their descendants, she decided to have a will made, and so informed Louis Beyer, Junior, on Sunday, July 12; she also inquired if a will made on Sunday was valid, and was told by him, after an examination of a cyclopaedia, that it would be. He suggested an attorney living near, to whom she objected, whereupon he proposed to call in Mr. Brennan, who occupied an office in the same building in which he was employed. This was satisfactory. Mr. Brennan was sent for. Witnesses were asked to attend, among them her regular physician. Mr. Brennan came in the afternoon, found her lying in bed, received instructions from her how she wanted the will drawn, and wrote it then and there. It was thereafter read to her, signed and acknowledged by her in the presence of himself, the regular physician, and a Mr. Sullivan, and signed by them as witnesses. That will was similar to the one finally executed, except that it devised the property to Louis Beyer, Junior, alone. Mr. Brennan took the will to his office. On examination he found that he had left out the word "heirs," so that, as he thought, only a life estate would pass to the devisee, and on Monday prepared a new will, exactly like the one which had been executed, with the addition of the word "heirs." He called on the testatrix and explained the change he had made; she then said that, inasmuch as there had to be a new will executed, she would like to have Mrs. Johnson included with Louis Beyer, Junior. Whereupon Mr. Brennan went to his office and wrote a will the third time, and on Tuesday went back to the house, and there it was executed. That is the will in dispute. It was taken by him to his office and kept in his hands until after her death. That the contents of this will were known to her at the time of its execution, and that she was "of sound and disposing mind, mem-

ory and understanding, and capable of executing a valid deed or contract," were found by the jury, and were abundantly proved by the testimony, among the witnesses thereto being her regular physician, the minister who visited her, the lawyer who drafted the will, and others wholly disinterested.

Before noticing what is claimed to be evidence of undue influence, we remark that the will was not an unnatural one for the testatrix to make. As long as she supposed her husband would inherit the real estate, she declined to make any. She meant that he should have the benefit of the property. She found, however, that it was necessary for her to make a will in order to secure this result. He was an old man, and in the natural course of events could not be expected to live many years. It is not strange that, with the utmost affection for her sisters, she should prefer that, after he had had the enjoyment of her property, it should go to the nephew and niece who had made their home with her, who had been brought up by her, and one of whom, at least, was regarded as an adopted child. So she makes a will vesting the fee in them, but charged with the duty of furnishing a home to her husband as long as he lived, and relying upon their affection to give to him the comforts of a home such as they all had had together in the past. While she gave them the power of alienation, she coupled with it the proviso that whatever was done with this property they should still secure a home to him during his lifetime. She trusted much to their affection, but is this singular considering the length of time they had been members of her family and that which she must have known to be the relation subsisting between them and him? Yet she did not leave provision for her husband entirely to their affection. She directed in terms that such provision should be made, and she doubtless believed that that direction would be binding, and it was binding. It was in the nature of a precatory trust, and so expressed as to be obligatory upon the devisees and enforcible in the courts. (*Colton* v. *Colton*, 127 U. S. 300.) It is no ground of criticism that others might have made a different will. That she did not give the fee to her husband, but to her adopted son and niece, burdened with this precatory trust, may have been owing to a fact which is, at least, suggested by the testimony, that her husband was visionary, and she feared might waste his property in developing some of his supposed inventions. That she was justified in placing confidence in the affection of the devisees for her husband is shown by the fact that they conveyed to him a large portion of the property upon hearing that he was dissatisfied with the contents of the will. It is true that some time thereafter, owing to his contemplated marriage, the pleasant relations between him and them seem to have ceased, but this unfortunate condition does not prove that the testatrix did not at the time have good reason to trust in their affection for him.

Turning now to the testimony offered to show undue influence, it comes from two witnesses, Mrs. Stone, the daughter of the appellee, and Fanny

Perry, a colored servant in the house of the testatrix. Mrs. Stone's testimony is mainly concerning the condition of the testatrix during her last sickness, and had a tendency to show that she was in a drowsy condition, if not unconscious, during the last fourteen days of her life, though as she was at the house of the testatrix only every other day, and then for but a few minutes at a time, her testimony was properly considered by the jury as of no great significance and overborne by that of the physician and other witnesses. She does testify to one thing in reference to Mrs. Johnson, which will be considered hereafter. The only other witness, and the one upon whom the appellee substantially relies, is Fanny Perry, the servant. Now, in respect to her testimony, and indeed all the testimony in the case, it must be observed that there is not a syllable tending to show that Louis Beyer, Junior, ever urged the testatrix to make a will, ever suggested or spoke to her in respect to the matter, and that all the connection he had with it was in response to requests to ascertain what would be the disposition of the property without a will, the validity of a will made on Sunday, and in suggesting the name of a lawyer to prepare the will and asking him to come. Now, to find that the will was obtained by undue influence on his part, when there is not the slightest syllable tending to show that he ever said or did a thing toward securing the execution of the will except at her request, is a proposition which cannot for one moment be entertained. With this must also be remembered that the will which was first drawn, the one executed on Sunday, made him the sole devisee, and that it was intended by the testatrix to vest the property absolutely in him, so as to deprive the appellee and other of her relatives of any interest in the property. That it did not have that effect was owing to a mistake of the scrivener in omitting the word "heirs," a mistake which, when discovered by him, he proceeded promptly to correct, and only when the corrected will was presented to her did she authorize a change so as to include Mrs. Johnson. Suppose it were true that Mrs. Johnson did after the first will by her importunity persuade the testatrix to include her as a devisee, the change wrought no prejudice to the interests of the appellee. It took away nothing from her. It only added a new devisee, and that not the appellee—another one to share in the property.

But now, let us see what is the testimony which is claimed to show that Mrs. Johnson exercised undue influence. Mrs. Stone testified that she boarded with the testatrix for a couple of years, (and that was a year or two before the death of testatrix,) and that during that time, when Mrs. Johnson seemed displeased at something, she heard the testatrix say that "it was because she did not make a will and she never intended to make a will." Fanny Perry testified that she lived with the testatrix about three years prior to her death; that Mrs. Stone called at the house on the Sunday when the first will was executed, and she heard Mrs. Johnson say to Louis Beyer, Junior, "you go down stairs, and after you get the wagon

hitched up take Mrs. Stone around to the Christian Endeavor encampment first, and then take her home; if she knows what is going on here she won't leave here to-night unless she gets a share in the profits;" that she had heard Mrs. Johnson ask the testatrix to make a will, but the testatrix refused, saying that she would leave everything to Mr. Beyer just as it was, and for them to stay with him and treat him right, and when he died he would do right by them. To which Mrs. Johnson replied: "This is the way you are going to treat me after I have been working for you all these years, and this will be all the thanks I'll get for doing it;" that after the testatrix had taken to her bed she asked her to make a will, but she said she would not, but would leave the property to her husband, to which Mrs. Johnson said: "Yes, you will leave it to him, and he will sink it in a boat or rum mill;" and the testatrix replied: "Nellie, how can you talk about your uncle like that?" and also, "Nellie, you are harassing me to death." Whereupon Mrs. Johnson said she would go if the will was not made, and the testatrix replied: "You have run Mrs. Stone out of the house to get something when I die. You said she was waiting for a dead man's shoes, but you are the one to catch it."

We put out of consideration the fact that Mrs. Johnson contradicts the witness and denies ever having urged the testatrix to make a will in her behalf or to make a will at all, and inquire whether, giving the fullest weight to this testimony, it warrants a finding that the execution of this will was secured by undue influence. We are clear that it does not. The conversations which the witness states were had while the testatrix was about the house and attending to her ordinary duties were conversations which might naturally be had between one brought up in the family, as Mrs. Johnson was, and one who had been to her as a mother. It would not be strange that having lived all her life in the family she felt that there was something due to her in respect to the disposition of the property. It will be remembered that it is not influence, but undue influence, that is charged, and is necessary to overthrow a will. The question No. 2 puts in the same category fraud, circumvention and undue influence. Placing undue influence along with fraud and circumvention interprets the character of the influence. *Noscitur a sociis.* Surely there is nothing in these conversations which has in it anything suggestive of fraud or circumvention, nothing wrongful or misleading.

With reference to the last conversation detailed by the witness, that which took place after the testatrix had taken to her bed, it may be conceded that there is a display of urgency and petulance on the part of Mrs. Johnson and a rebuke on the part of the testatrix, but is there enough in it to justify a finding that the will was procured by undue influence? May not one situated as was Mrs. Johnson properly plead her claims for recognition in a will? May she not give her reasons why a will should be made

and why property should not be left to a particular person without being subject to the charge of exerting undue influence? The only threat made by her was that she would go if the will was not made. We do not, of course, approve of such importunity to a sick person, and it may often be carried to such an extent that a jury is justified in finding that a will was executed in pursuance of it, and through undue influence, but these significant facts must be borne in mind in respect to this case: The witness, Fanny Perry, does not locate the time of this conversation, whether before the first will was executed or after. If before, plainly it had no effect upon the testatrix, for she made a will giving the property to her adopted son and leaving Mrs. Johnson out all together. If after, while it may have had the effect of causing the insertion of Mrs. Johnson's name in the second, such change wrought no injury to the rights of the appellee. If the testatrix had made up her mind to give her property to an adopted child with a precatory trust in behalf of her husband, then any change made in the devisees, as the result of whatever importunity, was a change which wrought no prejudice to the parties who were not named in either will.

We are clearly of the opinion that the jury were not under the circumstances of this case warranted in finding that the execution of the will was procured by fraud, circumvention or undue influence practiced or exercised upon the testatrix.

One who is familiar with the volume of litigation which is now flooding the courts cannot fail to be attracted by the fact that actions to set aside wills are of frequent occurrence. In such actions the testator cannot be heard, and very trifling matters are often pressed upon the attention of the court or jury as evidence of want of mental capacity or of the existence of undue influence. Whatever rule may obtain elsewhere we wish it distinctly understood to be the rule of the Federal courts that the will of a person found to be possessed of sound mind and memory is not to be set aside on evidence tending to show only a possibility or suspicion of undue influence. The expressed intentions of the testator should not be thwarted without clear reason therefor.

The decrees of the Court of Appeals and of the Supreme Court of the District are reversed and the case remanded to the latter court, with instructions to set aside the decree in favor of the appellee, and for further proceedings in conformity to this opinion.

Mr. Justice HARLAN and Mr. Justice GRAY did not hear the argument and took no part in the decision of this case.